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Didier Bigo, Sergio Carrera, Elspeth Guild, Emmanuel-Pierre Guittet, Julien Jeandesboz, Valsamis Mitsilegas, Francesco Ragazzi and Amandine Scherrer

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Abstract

This paper examines the EU's counter-terrorism policies responding to the Paris attacks of 13 November 2015. It argues that these events call for a re-think of the current information-sharing and preventive-justice model guiding the EU's counter-terrorism tools, along with security agencies such as Europol and Eurojust. Priority should be given to independently evaluating 'what has worked' and 'what has not' when it comes to police and criminal justice cooperation in the Union.

Current EU counter-terrorism policies face two challenges: one is related to their efficiency and other concerns their legality. 'More data' without the necessary human resources, more effective cross-border operational cooperation and more trust between the law enforcement authorities of EU member states is not an efficient policy response. Large-scale surveillance and preventive justice techniques are also incompatible with the legal and judicial standards developed by the Court of Justice of the EU.

The EU can bring further added value first, by boosting traditional policing and criminal justice cooperation to fight terrorism; second, by re-directing EU agencies' competences towards more coordination and support in cross-border operational cooperation and joint investigations, subject to greater accountability checks (Europol and Eurojust +); and third, by improving the use of policy measures following a criminal justice-led cooperation model focused on improving cross-border joint investigations and the use of information that meets the quality standards of 'evidence' in criminal judicial proceedings.

Any EU and national counter-terrorism policies must not undermine democratic rule of law, fundamental rights or the EU's founding constitutional principles, such as the free movement of persons and the Schengen system. Otherwise, these policies will defeat their purpose by generating more insecurity, instability, mistrust and legal uncertainty for all.



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**Didier Bigo, Sergio Carrera, Elspeth Guild,
Emmanuel-Pierre Guittet, Julien Jeandesboz, Valsamis
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1. Introduction

The Paris attacks of 13 November 2015 and the set of emergency measures that followed have led to widespread discussions on the changing relationship between security and liberty in counter-terrorism policies. The attacks have yet again brought to the fore a fundamental question: What kinds of public policies should be devised to respond to these events? What could the EU do to bring added value when addressing terrorism and criminality?

This essay examines these questions by assessing the EU's responses to the Paris attacks. The analysis follows up and builds upon a previous essay in which we examined the EU policy agenda after the January shootings in France.¹ The political context surrounding the most recent attacks is rather different, however.

Discussions have lately centred on the so-called 'refugee crisis', which have in turn led to some voices challenging the sustainability of the Schengen (control-free national borders) system. While border control was already part of the debates and controversies that followed the January attacks, recent developments have brought further pressure to bear on the legitimacy of EU border and asylum policies.

Some of the EU policy responses that have followed the most recent attacks, including the Council Conclusions on Counter-Terrorism adopted on 20 November 2015, seem to give in to the claims that the strengthening of external border controls and the monitoring of cross-border movements of persons within the Schengen area are an efficient way to respond to the Paris attacks.

The acceptance of a link between the cross-border movements of persons and terrorism leads to a reinvigoration of public policies giving priority to large-scale surveillance and an intelligence-driven approach to law enforcement. These aim at systematically monitoring the travels of EU citizens and third country nationals inside and outside the EU. A case in point is the EU Passenger Name Record (EU PNR), which would establish a new database of records on the movements of EU citizens and residents by air.

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¹ See D. Bigo, E. Brouwer, S. Carrera, E. Guild, E.-P. Guittet, J. Jeandesboz, F. Ragazzi and A. Scherrer, *The EU Counter-Terrorism Policy Responses to the Attacks in Paris: Towards an EU Security and Liberty Agenda*, CEPS Papers in Liberty and Security in Europe, No. 81, CEPS, Brussels, February 2015.

The linking of counter-terrorism and border controls contributes to demoting traditional police and criminal justice responses to cross-border criminality, subject to the standard democratic rule of law and fundamental rights checks and balances. It conveys and strengthens a message that such law enforcement techniques do not ‘fit the purpose’ of responding to current challenges, and that exceptional measures, based on intelligence gathering and generalised electronic surveillance, are necessary.

These assumptions are a matter of controversy rather than consensus. Some of the EU policy initiatives foregrounded in the wake of the most recent Paris attacks raise major questions as regards their compatibility with free movement and the Schengen framework (Bigo, Carrera, Hernanz and Scherrer, 2015). They also stand in a difficult relationship with the privacy and fundamental rights legal standards developed by the Court of Justice of the European Union (CJEU) in recent landmark judgments (Carrera and Guild, 2014; Carrera and Guild, 2015b).

The current circumstances should be taken as an opportunity to re-think the outlook and the priorities driving the EU’s counter-terrorism model developed over the last three decades. The priority should be on independently evaluating ‘what has worked’ and ‘what has not’ when it comes to police and criminal justice cooperation.

These are fields where the EU counts now with stronger legal competence under the Treaties. This is especially so since December 2014, when the full enforcement powers of the European Commission and the CJEU were recognised.

Particular attention should be paid to addressing current obstacles affecting the effective utilisation and added value of ‘information sharing’ technological instruments – such as the Schengen Information System II (SIS II) or the so-called ‘Prüm Decision’, and similar information-based methods used by EU agencies, including Europol and Eurojust.

‘More data’ without the necessary human resources and better cross-border operational cooperation among the law enforcement authorities of EU member states is not an efficient policy response. Surveillance and ‘preventive justice’ paradigms also raise profound legal challenges from the perspective of EU law and the constitutional standards developed by the Luxembourg Court when it comes to the essence of the rights of defence and privacy.

This essay argues that the EU should instead give priority to a new EU counter-terrorism and crime model grounded first on traditional policing and criminal justice responses to criminality; second, on reinforcing EU agencies’ competences to coordinate and support cross-border operational cooperation; and third, on a *criminal justice-based* cooperation model focused on improving cross-border joint investigations and the use of information that meets the quality standards of ‘evidence’ in criminal judicial proceedings.

More EU in these domains should be firmly and unequivocally anchored in its democratic rule of law, fundamental rights and criminal justice principles and traditions.

2. The EU counter-terrorism model: State of play

The current EU counter-terrorism model in the field of police and justice cooperation follows from the broader approach of EU internal security endorsed over the last few years, in the run-up to and following the entry into force of the Lisbon Treaty (Scherrer, Jeandesboz and Guittet, 2011). It is based on earlier experience of the Schengen cooperation framework, and foregrounds the establishment and use of data processing schemes, including information sharing networks, large-scale information systems and databases.

This process has for a long time developed discreetly. It was only in 2010 that a first overview of information sharing within the area of freedom, security and justice was made available to interested parties and citizens. In this overview, the home affairs services of the European Commission themselves noted that “policies in the area of freedom, security and justice have developed in an incremental manner,

yielding a number of information systems and instruments of varying size, scope and purpose”, and suggested the need for a more ‘coherent’ approach.²

The schemes include the Schengen Information System II (SIS II), a centralised EU database used in particular for persons to be refused entry or subject to specific checks at EU external borders, and the Prüm Decision, a decentralised system for the exchange of information for the prevention and investigation of criminal offences (Bigo et al., 2012).

Some of these schemes are associated with EU agencies that support member states in policing and criminal investigation. In the field of counter-terrorism, this concerns chiefly the European Police Office (Europol), which provides a channel of coordination and information analysis and sharing to member state law enforcement services engaged in cross-border investigations, and the EU’s Judicial Cooperation Unit (Eurojust).

Despite these developments, little is actually known as to whether the predominant ‘trust’ in data sharing is well founded, and until the present, European internal security cooperation has moved forward under the guises of a model calling for more information storage, sharing and processing.

The priority that has been given so far to information sharing-based cooperation at EU levels may be understood as an attempt to avoid or overcome deeper questions related to sovereignty and struggles in power relations concerning competences for police and criminal justice cooperation between EU member states and European institutions and agencies. These policy fields have been embedded in national traditions and exclusive competences of the member states within the remits of the EU Treaties, in particular those under the concept of ‘national security’.

Yet these Treaty and legal constraints have not prevented European security cooperation from advancing, particularly in intelligence-driven (data-sharing) security tools and agencies. The EU is already playing a role in questions related to ‘national security’ when it comes to counter-terrorism and cross-border crime policies, especially those pertaining to information sharing (Bigo et al., 2013).

The end of the transitional period envisaged in the Lisbon Treaty (Protocol 36) of five years in December 2014 and the consequent transfer of the old EU Third Pillar (police and criminal justice cooperation) under the Community method of cooperation, have effectively meant the activation of the enforcement powers of the European Commission and the CJEU over member states’ actions implementing EU security instruments.

This ‘new phase’ in European cooperation³ calls for a careful reconfiguration of the previous dynamics in supranational cooperation, along with the tools and actors in the field of internal security (Mitsilegas, Carrera and Eisele, 2014). This reconfiguration should give priority to

- first, developing an independent assessment and a permanent evaluation system on the operability and added value of current tools and agencies; and
- second, fostering operational, administrative and judicial cross-border cooperation in the EU based on what the domestic practitioners involved in countering crime and terrorism actually need.

A *criminal justice-led approach* in EU crime-fighting and counter-terrorism policy should be prioritised here. EU police and the criminal justice tools of electronic information as well as the mandates of the actors should be re-designed accordingly to primarily serve this purpose.

The current fragmented landscape of EU databases and information systems should be streamlined, clarified and made subject to independent judicial controls and guarantees. The roles of Europol and Eurojust activities should be mainly re-focused towards *more* operational support in joint activities by member states’ authorities (Europol and Eurojust +), and *less* on ‘intelligence-based information

² European Commission, Overview of information management in the area of freedom, security and justice, European Commission, Brussels, COM(2010) 385 final, 20.7.2010.

³ See European Commission, A New Chapter for Cross-Border Criminal Justice by First-Vice President Frans Timmermans, 13 November 2014, Speech 14/1701 (http://europa.eu/rapid/press-release_SPEECH-14-1701_en.htm).

exchange’, subject to clear standards of judicial accountability and a solid legal framework of suspects’ rights.

A key precondition for such a criminal justice-led approach to be successful would be to play under the same ‘rules of the game’ and the same degrees of judicial, democratic and legal accountability (checks and balances) as those at domestic levels.

Domestic and EU democratic rule of law with fundamental rights standards must not go at the expense of any counter-terrorism measure; otherwise, EU counter-terrorism policies will defeat their purpose by generating more insecurity, mistrust and legal uncertainty in the EU.

3. What have been the EU responses?

Discussions at EU levels so far have greatly focused on reasserting past priorities, harnessing ongoing developments and racing forward in taking new measures, with a clear focus on the linkage between counter-terrorism and border control.

This focus is very central to the measures evoked by the European Commission shortly after the Paris attacks.⁴ On the one hand, there is emphasis on intensifying the use of available tools, in particular SIS II,⁵ in order to increase checks on EU citizens at the EU external borders and screen for common risk indicators concerning ‘foreign terrorist fighters’ outlined in Commission Recommendation (2015) 3894 published in June this year.⁶ On the other hand, there are concentrated efforts to fast-forward initiatives currently under discussion.

The Commission calls for the EU PNR proposal to be adopted ‘swiftly’ by the co-legislators.⁷ The Commission announced its current work on a number of ‘aviation security-risk assessments’ related to “air cargo, passenger-related risks to aviation security, risks from conflict zones and the development of risk criteria for the analysis of pre-loading advance cargo information”.⁸ The Commission, finally, envisages coming back to the ‘smart borders package’ (EU entry/exist system) in 2016 to track third country nationals’ movements across EU external borders (Jeandesboz et al., 2013).⁹

⁴ These follow closely the priorities outlined in the European Agenda on Security adopted on April 2015. See European Commission, The European Agenda on Security, COM(2015) 185 final, Brussels 28.4.2015. Refer also to http://europa.eu/rapid/press-release_MEMO-15-6115_en.htm and http://europa.eu/rapid/press-release_SPEECH-15-6125_en.htm.

⁵ See Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006; and Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205, 7.8.2007.

⁶ See the Commission Recommendations of 15.6.2015 amending the Recommendation establishing a common ‘Practical Handbook for Border Guards (Schengen Handbook)’ to be used by Member States’ competent authorities when carrying out the border control of persons (C(2006) 5186 final), C(2015) 3894 final, Brussels, 15.6.2015 (http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/docs/commission_recommendation_c_2015_3894_en.pdf and <http://www.statewatch.org/news/2015/may/eu-council-ff-sbc-risk-indicators-8741-15.pdf>).

⁷ See the Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32 final, Brussels, 2.2.2011.

⁸ See http://europa.eu/rapid/press-release_MEMO-15-6115_en.htm.

⁹ See European Commission, Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95 final, Brussels, 28.2.2013; and European Commission, Proposal for a Regulation establishing a Registered Traveller Programme, COM(2013) 97 final, 28.2.2013, Brussels. The European Commission’s European Agenda on Migration (COM(2015) 240 final, Brussels, 13.5.2015) also states:

[a] new phase would come with the ‘Smart Borders’ initiative to increase the efficiency of border crossings, facilitating crossings for the large majority of ‘bona fide’ third country travellers, whilst at the same time strengthening the fight against irregular migration by creating a record of all cross-border movements by third country nationals, fully respecting proportionality. Following initial discussions on the first proposal and to

In a similar logic focused on border controls, the Commission has stressed that “common high standards of border management are essential to fight terrorism”. Reference has been made here to the plan to discuss the setting up of a ‘European Border Guard’.¹⁰

Increasing the operational cooperation of cross-border police in the EU has been identified as a key action, mainly through further promoting the use of Joint Investigation Teams (JITs), which gather police authorities from several EU states to investigate cross-border crimes.

The Commission has also called for improving coordination of the work of Europol and Eurojust in facilitating and supporting cross-border national investigations and cooperation. Europol will be bolstered with an EU Internet Referral Unit (EU IRU)¹¹ and a European Counter Terrorism Centre (ECTC), as well as the continuation of the work of its European Cybercrime Centre (EC3).¹² Other initiatives put forward relate to ensuring the use and implementation by EU member states of the Prüm Decision to its full potential.¹³

The Press Release additionally makes reference to the need to concentrate on policies dealing with radicalisation among young people, and cover such issues as the role of education and other ‘soft’ policies, use of the internet and the Radicalisation Awareness Network (RAN) Centre of Excellence.¹⁴

The Commission has also given attention to strengthening firearms controls in the EU,¹⁵ which includes a new proposal revising the former Firearms Directive (91/477/EEC), aimed at tightening controls on the acquisition and possession of firearms.¹⁶

This comes along with a plan for the Commission to propose a new Directive harmonising the criminalisation of offences linked to “terrorist travel, passive training, financing and facilitation of such travel”. This would update the Framework Decision on Combating Terrorism, with the goal of implementing UNSC Resolution 2178 (2014) and the additional Protocol to the Council of Europe's Convention on the Prevention of terrorism.¹⁷

take into account concerns raised by the co-legislators, the Commission intends to present a revised proposal on Smart Borders by the beginning of 2016 (p. 11).

¹⁰ See the European Commission's European Agenda on Migration (ibid.), which states:

[t]he scaling up of action in the Mediterranean exposes the reality of the management of external borders increasingly being a shared responsibility. As well as a European System of Border Guards, this would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as a the possibility of moving towards a European Coastguard (p. 17).

¹¹ See www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=LD&DOC_ID=ST-7266-2015-INIT. The envisaged tasks are as follows: to coordinate and share the identification tasks (flagging) of terrorist and violent extremist online content with relevant partners; to carry out and support referrals quickly, efficiently and effectively, in close cooperation with the industry; to support competent authorities, by providing strategic analysis and operational analysis; and to act as a European centre of excellence for the above tasks.

¹² See www.europol.europa.eu/ec3.

¹³ See Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:j10005>).

¹⁴ The RAN was launched by the European Commission in September 2011. The RAN brings together practitioners, experts and policy-makers from member states, sectors, organisations and academia to discuss and identify ‘good practices’ in dealing with radicalisation. See http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/index_en.htm.

¹⁵ See http://europa.eu/rapid/press-release_MEMO-15-6111_en.htm and http://europa.eu/rapid/press-release_IP-15-6110_en.htm.

¹⁶ Ibid. See also European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, 2015.

¹⁷ See the Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, OJ L 164, 22.6.2002 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33168>).

The Justice and Home Affairs Council adopted Conclusions on Counter-Terrorism on 20 November 2015.¹⁸ The Conclusions underline the need to accelerate implementation of the tasks outlined below.

First, is to adopt the EU PNR proposal before the end of 2015, which, in view of EU member states, “should include internal flights in its scope, provide for a sufficiently long data period during which PNR data can be retained in non-masked out form and should not be limited to crimes with a transnational nature”.¹⁹ A report issued by the EU Counter-Terrorism Coordinator following these Council Conclusions has controversially stated in this respect:

[t]he rapporteur’s ability to broker a deal with the Presidency is hampered by the fact that, except for the EPP shadow rapporteur, his report was not supported by other shadow rapporteurs, but by a heterogeneous majority across party lines. The EP’s commitment in its resolution of 11 February 2015 to work towards passage of a PNR Directive by the end of 2015 has so far not been shared by the shadow rapporteurs (S&D, ALDE, Greens, GUE) who voted against the Kirkhope report.²⁰

Second, is to increase operational cooperation through Europol in the EU policy cycle on serious and organised crime in the Operational Action Plan on Firearms. The Council also invites Europol and Frontex to assist EU member states bordering the Western Balkans to increase controls of the external borders to detect smuggling of arms.

Third, is to strengthen controls of external borders, so that member states “implement immediately the necessary systematic and coordinated checks at external borders, including on individuals enjoying the right of free movement”. In addition is the task of upgrading the border control systems of EU member states by March 2016, including “electronic connection to the relevant Interpol databases at all external border crossing points [and] automatic screening of travel documents”. The Conclusions also state that in the context of the current migratory crisis, a key priority should be to ensure

a systematic registration, including fingerprinting, of all migrants entering into the Schengen area and perform systematic security checks by using relevant databases in particular SIS II, Interpol SLTD database, VIS and national police databases, with the support of Frontex and Europol, and ensure that hotspots are equipped with the relevant technology. Europol will deploy guest officers to the hotspots in support of the screening process, in particular by reinforcing secondary security controls.

The Council calls on the Commission to include EU nationals in the upcoming smart borders proposal and to revise Art. 7.2 of the Schengen Borders Code, as well as to provide a strong basis in the proposal amending the Frontex mandate for its contribution in the fight against terrorism and organised crime, and access to all relevant databases.

¹⁸ See www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/ and see also the Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, Press Release, 848/15, 20.11.2015 (www.consilium.europa.eu/press-releases-pdf/2015/11/40802205351_en_63583643520000000.pdf). Refer also to Council of the EU, Counter-Terrorism Coordinator, *Report: State of play on implementation of the statement of the Members of the European Council of 12 February 2015 on counter-terrorism*, 14438/15, Brussels, 23 November 2015.

¹⁹ The Council’s website states:

Etienne Schneider, Luxembourg Deputy Prime Minister, Minister of Internal Security and President of the Council said: “The Council recalled the urgency and importance it attaches to the European Passenger Name Record directive. The Presidency maintains its aim of finalising this dossier before the end of this year. We have to negotiate an effective and operational directive which should include internal flights and a reasonable data retention period, and which should not be limited to crimes of a transnational nature. That is the negotiating mandate which was confirmed today by the Council.”

See “Justice and Home Affairs Council, 20/11/2015” (www.consilium.europa.eu/en/meetings/jha/2015/11/20/).

²⁰ Council of the EU, Counter-Terrorism Coordinator, *Report: State of play on implementation of the statement of the Members of the European Council of 12 February 2015 on counter-terrorism*, 14438/15, Brussels, 23 November 2015, p. 2.

Fourth, is to improve information sharing, so that national authorities insert data in the SIS II on “all suspected foreign terrorist fighters” and “carry out awareness raising and training on SIS”, and adopt a common approach on SIS II and ‘foreign fighters data’.

Fifth, is to establish at Europol the ECTC, which is expected to “increase information sharing and operational coordination with regard to the monitoring and investigation of foreign terrorist fighters, the trafficking of illegal firearms and terrorist financing”. Member states are to second counter-terrorism experts, so as “to form an enhanced cross-border investigation support unit, capable of providing quick and comprehensive support to the investigation of major terrorist incidents in the EU”. The Conclusions also call for the Commission to present a new legislative proposal, so that Europol can ‘cross-check’ the Europol databases against the SIS II.

Sixth, is to present a new legislative proposal on terrorist financing, so as to strengthen, harmonise and improve the cooperation among financial intelligence units (FIUs) through the link between the FIU.net network for information exchange with Europol.

Seventh, on the “criminal justice response to terrorism and violent extremism”, the Council invites the Commission to present a proposal for a directive updating the Framework Decision on Combating Terrorism before the end of 2015, with a view to collectively implementing into EU law UNSC Resolution 2178 (2014) and the additional Protocol to the Council of Europe’s Convention.

In a separate press release, the EU Council has outlined measures “on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism”.²¹ The measures concern three main areas: i) the structure and organisation of detention regimes (the development of risk assessment tools and the concentration or dispersion of detainees); ii) alternatives to detention regimes, in particular on the question of returning foreign fighters; and iii) measures orientated at the integration, rehabilitation and reintegration of “radicals” and former radicals.

On 25 November 2015, the European Parliament reinforced these orientations by voting on the draft report on preventing radicalisation,²² stressing again the importance of adopting the EU PNR proposal. It also suggested increasing the exchange of information among member states, particularly in relation to the returning foreign fighters, with the objective of setting up judicial control and possibly administrative detention based on a ‘blacklisting’ process. Finally, concerning prisons, the report advocated that “the Member States segregate radicalised inmates within their prisons in order to prevent radicalism from being imposed through intimidation on other inmates and to contain radicalisation in those institutions”.

4. The challenges of legality and efficiency

So far, one of the most controversial discussions emerging from the recent Paris attacks has concerned the linkage or *continuum* between terrorism and migration, asylum and borders in the EU. One of the stories (still inconclusive at the time of writing) that ended up in the media was that allegedly one of the perpetrators had a fake Syrian passport and travelled to the EU through Greece.

Still, representatives from extreme-right political parties have blamed the events on the EU’s free movement policy and the recent EU policy responses to the so-called ‘refugee crisis’.

Marine Le Pen, leader of the French National Front, for instance, has called for permanently reintroducing national border controls.²³ Government representatives of EU member states, such as those of Poland and

²¹ See Council of the EU, “Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism”, Press Release 845/15, Brussels, 20.11.2015 (www.consilium.europa.eu/en/press/press-releases/2015/11/20-conclusions-radicalisation/).

²² European Parliament, *Draft report on prevention of radicalisation and recruitment of European citizens by terrorist organisations* (2015/2063(INI)), 1.6.2015, paragraph 4 (www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-551.967%2B01%2BDOC%2BPDF%2BV0%2F%2FEN).

²³ See the “EU takes aim at weapons tied to terrorist attacks”, Politico, 18 November 2015 (www.politico.eu/article/eu-takes-aim-at-weapons-tied-to-terror-attacks-commission-schengen/).

Slovakia, have also declared that in light of the events they will not continue implementing the recently adopted EU temporary relocation system that distributes the assessment of asylum applications among EU member states (Carrera and Guild, 2015c).²⁴

The initial reactions of the European Commission have been welcomed, notably its insistence on the need to delink what has happened in Paris with the phenomenon of migration and asylum seekers in Europe, reminding EU member state governments of their acquired responsibilities.

The speech by European Commission President Jean-Claude Juncker at the G20 Meeting on 15 November 2015 underlined the need to avoid conflating terrorism with refugees in debates in Europe,²⁵ and that people seeking international protection are not criminals or potential terrorists. He argued:

I try to make it crystal clear that we should not mix the different categories of people coming to Europe. The one who is responsible for the attacks in Paris cannot be put on an equal footing with real refugees, with asylum seekers and with displaced people. These are criminals and not refugees or asylum seekers. I would like to invite those in Europe who are trying to change the migration agenda we have adopted – I would like to invite them to be serious about this and not to give in to these basic reactions. I don't like it.

Similarly, Juncker has stated that “[t]he cynics who exploit the suffering of Paris have not understood that those who perpetrated the attacks are precisely those whom the refugees are trying to flee”.²⁶

It is, however, surprising that despite this political message, some of the initiatives put forward in the Commission's European Security Agenda pay particular attention to cross-border mobility and external border policies.

Some of these policies give a predominant preference to ‘more data’, ‘intelligence’ and surveillance of people's mobility as among the key ways to respond to and prevent events like those in Paris. In a previous CEPS essay, we studied these measures in detail and argued that a majority raise important challenges to freedom of circulation and democratic rule of law.²⁷

Some of the border-related actions proposed by the Commission and the Council entail the assumption that an effective way to respond to the Paris attacks would be to strengthen external border controls and those for the intra-EU cross-border mobility of foreigners, EU citizens and residents. The focus has been mainly on ‘mobility’ as one of the factors facilitating acts of terrorism.

EU policy initiatives, such as the EU PNR, which have been on the table for several years already, indeed raise profound contradictions with the Schengen (free movement) logics and the rights and freedoms of citizens and residents in the EU. They would put under surveillance the movements of every citizen and resident in the EU within EU borders and when leaving the common Schengen territory. There is furthermore absolutely no evidence proving the need for an EU PNR system, its value added and effectiveness.

Similar questions can be raised as regards the current measures focused on intensifying checks on EU citizens against existing databases at the common EU external borders, the use of common risk indicators concerning ‘foreign terrorist fighters’, the ‘smart borders proposals’ or the envisaged expansion of the Frontex mandate to work on counter-terrorism.

²⁴ See “Juncker: Don't mix up terrorist and refugees”, Euractiv, 15 November 2015 ([/www.euractiv.com/sections/global-europe/poland-wont-relocate-migrants-after-paris-attacks-319483](http://www.euractiv.com/sections/global-europe/poland-wont-relocate-migrants-after-paris-attacks-319483)) and (<https://euobserver.com/political/131114>).

²⁵ See European Commission, Transcript of Press Conference – G20 Summit in Antalya, 15 November 2015, Speech 15/6091 (http://europa.eu/rapid/press-release_SPEECH-15-6091_en.htm).

²⁶ See Jean-Claude Juncker, *A European Approach to Migration: Learning the Lessons of Malta*, 22 November 2015 (<http://independent.com.mt/articles/2015-11-22/blogs-opinions/A-European-approach-to-migration-learning-the-lessons-of-Malta-6736145635>).

²⁷ See Bigo, Brouwer, Carrera, Guild, Guittet, Jeandesboz, Ragazzi and Scherrer (2015), op. cit.

Particularly problematic is the Council's call for the Commission to amend the Schengen Borders Code in order to allow more systematic checks on EU citizens going abroad and when travelling within the EU by air. Targeting EU citizens' movements inside and outside the Schengen territory poses fundamental challenges to the principle of free movement.

The introduction of internal mobility controls and those that prevent EU citizens from leaving EU territory would stand in a difficult relationship with Art. 5.1 of the European Convention of Human Rights and Fundamental Freedoms and the legal standards developed by the Strasbourg Court when restrictions are applied by states to the individuals' right of liberty.²⁸ The criminalisation and restrictions on mobility are likely to contravene European human rights norms, including the right to leave.

The proposed revisions of the Framework Decision on Combating Terrorism with the goal of implementing UNSC Resolution 2178 (2014) and the additional Protocol to the Council of Europe's Convention on the Prevention of Terrorism may be equally problematic. The criminalisation of the mobility and travel of 'foreign fighters' jeopardises the relationship of trust between citizens and the state. It also blurs the distinction between citizens and foreigners on the one hand, and immigration and criminal law on the other (Mitsilegas, 2016).

The blurring of these boundaries leads to the emergence of a 'preventive justice regime' aimed at criminalising mobility in the EU. This will entail profound contradictions with basic EU constitutional principles and the EU Charter of Fundamental Rights, and may ultimately lead to litigation and potential annulment by the Luxembourg Court of Justice (Bigo, Carrera, Hernanz and Scherrer, 2015).²⁹

According to media reports, one of the attackers (Salah Abdeslam) was stopped near the Belgian border as many as three times, right after the attacks on Friday night, but they let him go.³⁰ This shows the need to carefully scrutinise the effectiveness, gaps and utility of the existing information-sharing security tools such as the SIS II.

Those voices referring to Schengen as 'being under threat' and criticising EU border policies very rarely acknowledge the fact that the free movement system relies heavily on a security apparatus that has been developed to 'compensate' for the security deficits emerging from the lifting of internal border checks (the so-called 'flanking measures').

Within this framework, the EU has a full array of centralised databases,³¹ some of which relate to cross-border criminality and terrorism. These include, among others, the above-mentioned SIS II, the Prüm Decision, the Swedish Initiative,³² the Europol Information System and Analytical Work Files and the Eurojust Case Management System (Bigo et al., 2012).

There is not, however, an overall picture concerning the entire setting of justice and home affairs databases at the EU level and the extent to which they are actually useful and being effectively utilised by national authorities. Nor is there a clear and objective understanding of how these tools are working in practice and the practical obstacles that characterise their implementation and effectiveness in the domestic arenas of EU member states.

This lack of overall clarity makes it difficult to reach a proper understanding of why existing instruments, such as the Prüm Decision, are not currently useful or of the extent to which they could be effective in

²⁸ Art. 5 ECHR enshrines the protection of the individual against arbitrary interference by the state with his or her right to liberty. See for instance, *Guzzardi v. Italy* (6 November 1980, Series A no. 39); *S.F. v. Switzerland* (no. 16360/90); and *Nada v. Switzerland* (no. 10593/08).

²⁹ See the 'Kadi' trilogy: Joined Cases C-402/05 P and C-415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 (Kadi I Judgment); see also Case T-306/01, *Yusuf and Al Barakaat Foundation v. Council* and Case T-315/01, *Kadi v. Council and Commission* of 21 September 2005, and also Case T-85/09, *Kadi v. European Commission*, 30 September 2010.

³⁰ See www.ft.com/intl/cms/s/0/22a0f686-8c74-11e5-a549-b89a1dfede9b.html#axzz3rwSVmEP2.

³¹ See www.ceps.eu/system/files/No%2052%20JHA%20Databases%20Smart%20Borders.pdf.

³² For more information, see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/information-exchange/eixm/index_en.htm.

practice. It also blurs a discussion as to why the EU needs more security databases, and why is it necessary to expand the use, purpose and accessibility of existing ones to a wider set of security actors to respond events like those witnessed in Paris on 13 November 2015.

Similarly, the activities of EU home affairs agencies like Europol or Eurojust call for closer evaluation and scrutiny. ‘Information sharing’, ‘knowledge’ and developing ‘intelligence’ lay at the heart of the competences and activities of these EU agencies (Parkin, 2012). Their operational competences (executive powers) on the ground remain by and large limited.

What has been the added value of these actors in their ‘supportive actions’ for EU member states, and have their tasks of exchanging information been useful when addressing cross-border criminality? Should their activities be redirected more towards supporting, from an operational perspective, member states’ domestic actors fighting criminality under clear and solid domestic and supranational accountabilities?

Despite all these open questions, the border-terrorism nexus fuels in turn the mantra that more information and large-scale electronic surveillance can be an effective response to acts of political violence and cross-border criminality. Yet, is that really the case?

The Paris events in both January and November 2015 have proved that from the perspective of crime fighting, ‘information’ or ‘more data’ in fact has not been efficient. As the media has reported, some of the perpetrators were already known to the French law enforcement and intelligence authorities.³³ The recent Paris events have shown that more data without the necessary human resources is pointless.³⁴

Experts have repeatedly underlined that large volumes of data cannot identify potential terrorist plots, yet greatly increase the possibility of false positives and negatives (Scherrer and Bigo, 2015).³⁵

Intelligence-led counter-terrorism and ‘preventive justice’ policies not only face an inefficiency problem, but also confront one of a legal nature. The framing of bulk collection and processing of data as a ‘solution’ would be difficult in the EU legal system. It would be simply illegal. The CJEU in Luxembourg has recently annulled the Data Retention Directive and the Safe Harbour Framework in two landmark judgments *Digital Rights Ireland* and *Schrems* (Carrera and Guild, 2015b; Carrera and Guild, 2014).³⁶

The Luxembourg Court held that these surveillance policies undermined the very essence of the fundamental human rights of privacy in the EU’s legal architecture on data protection and the rights of defence and fair trial. Any derogation of those rights must adhere to the proportionality and necessity principles, ensure access to effective remedies to individuals and be subject to independent judicial review.

Importantly, according to the Court, the fact that this ‘information’ could be potentially useful for law enforcement does not make the access and processing of data per se lawful when the interference undermines the essence of the right of privacy (Carrera and Guild, 2014).

To this, we need to add that ‘intelligence’ or ‘information’ cannot be confused with ‘evidence’ in criminal proceedings, which needs to comply with a set of rule of law standards and independent judicial supervision (Bigo, Carrera, Hernanz and Scherrer, 2015). Intelligence or information is not always evidence, and therefore useful in criminal proceedings. This distinction is of key importance to safeguard

³³ See “Revealed: How French secret services ‘lost track’ of one of the Bataclan bombers”, Mediapart, 22 November 2015 (www.mediapart.fr/en/journal/france/221115/revealed-how-french-secret-services-lost-track-one-bataclan-bombers and www.ft.com/intl/cms/s/0/a05a5178-8c8b-11e5-a549-b89a1dfede9b.html#axzz3rwSVmEP2).

³⁴ See « Abaaoud, Dahmani, Mostefai, les frères Abdeslam : des terroristes surveillés en vain », *Le Monde*, 23 November 2015 (http://abonnes.lemonde.fr/attaques-a-paris/article/2015/11/23/des-djihadistes-surveilles-et-fiches-en-vain_4815558_4809495.html).

³⁵ See “New York bomb plot shows limits of data mining”, Computerworlduk, 5 May 2010 (www.computerworlduk.com/data/new-york-bomb-plot-shows-limits-of-data-mining-3302/).

³⁶ See Case C-362/14, *Schrems v. Data Protection Commissioner*, 6 October 2015; see also Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, 8 April 2014.

the essence of the rights of defence and fair trial envisaged in the EU Charter of Fundamental Rights. Any counter-terrorism policy measure on ‘information exchange’ must also pass that legality test.

When it comes to preventing or countering radicalisation, the measures proposed continue to pose a set of fundamental challenges. One of these concerns the process of radicalisation itself and the ability to ‘predict’ it through indicators or assessment tools. As has now been shown in a large number of reports (Bigo et al., 2014, Ragazzi, 2015), no social science study supports the idea that radicalisation can be ‘spotted’ through indicators that could be used by social workers, or probation and frontline prison workers.

Assessment tools aimed at detecting radicalisation also present a high risk of becoming discriminatory, mistaking radicalisation for normal daily or religious practices. When it comes to prisons, recent work by the European Committee on Crime Problems (Council for Penological Co-operation) of the Council of Europe³⁷ has highlighted additional issues. First, there is currently no track record of ‘de-radicalisation’ programmes and their results. A second concern related to policies on preventing or countering radicalisation is their inherent dangers of mixing surveillance and rehabilitation work. This comes along with the high level of caution necessary when using adequate assessment tools in order to avoid discriminatory practices. The Committee on Prevention of Torture of the Council of Europe has recalled the strict conditions under which solitary confinement can be used in prisons.³⁸

5. What should the EU do?

Before moving forward with the envisaged information sharing and ‘intelligence’ model of law enforcement at the EU level, European institutions should take the Paris events as a signal to carry out a careful assessment, taking stock of what works and what does not and studying the feasibility of a ‘reconfiguration’ of the current EU counter-terrorism model.

European cooperation in the domains of police and criminal justice has until recently taken place outside the Community method and European supervision. Internal security tools and EU security agencies have mainly developed a ‘model’ consisting of information sharing and processing, and an intelligence-inspired approach to law enforcement. This has been partly the consequence of authority struggles around the limited EU legal competences when it comes to police cooperation under the Treaties.

The entry into force of the Lisbon Treaty in December 2009 and the end of the transitional period envisaged in Protocol 36 of the Treaties have meant that these domains now fall under the full competences of the European institutions. Art. 70 TFEU also points to the need to establish an evaluation system to facilitate the application of those policies functioning under the premises of the principle of mutual recognition, including criminal justice cooperation (Carrera and Guild, 2015a).

Coming back to the role played by EU agencies like Europol and Eurojust, the EU contribution as regards cross-border operational cooperation to the area of cross-border crime fighting hints at some positive transformative effects. Experiences like those of the JITs³⁹ of police and judicial authorities call for careful examination, as they have *the potential* to play a key role in developing mutual trust and cooperation among law enforcement authorities of EU member states. Similarly, the value and potential of the operational cooperation dimension included in the Prüm Decision calls for closer examination.

³⁷ See Council of Europe, Draft Guidelines for Prison and Probation Services regarding Radicalisation and Violent Extremism, Strasbourg (www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/PC-CP%20%282015%29%202%20Rev%204_E%20Guidelines%2017%20NovemberClean.pdf).

³⁸ See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2015, Strasbourg, January 2015 (www.cpt.coe.int/en/documents/eng-standards.pdf).

³⁹ For more information on Joint Investigation Teams, see www.europol.europa.eu/content/page/joint-investigation-teams-989 (Europol) and www.eurojust.europa.eu/practitioners/jits/pages/historical-background.aspx (Eurojust).

An independent evaluation of these experiences is first necessary in order to examine their added value and identify areas where more EU, and agencies like Europol and Eurojust, could be effective when launching, coordinating and intervening in JITs or other cross-border operational activities.

The proper allocation of financial resources should follow here. This exercise should comprise a comparison between the financial resources that have been so far allocated to JITs and those foreseen in EU information sharing tools and envisaged proposals (e.g. the EU PNR and smart borders).

Better cooperation between EU member states and Europol/Eurojust on the one hand, and between Europol and Eurojust on the other hand, is critical. It must be subject to stronger judicial and democratic accountability. Furthering the development of JITs and increasing their use would allow for better EU cooperation. Such cooperation could set a high ‘benchmark’ in operational efficiency, but also in terms of safeguarding fundamental rights and rule of law in counter-terrorism and crime.

JITs should facilitate investigations rather than focus on intelligence gathering. They could provide a platform that could be used to determine the optimal investigation and prosecution strategies. Yet to improve JITs, some obstacles would need to be overcome:

- first, is to address the legal uncertainty stemming from the existing, dual legal basis for JITs;⁴⁰
- second, is to tackle the difficulties in progressing the harmonisation of criminal justice standards and the integration of cooperative criminal justice agreements; and
- third, concerns carrying out the investigations in full accordance with the national laws of the member state within which the JIT would be located. There is an absolute need for common investigation standards and accountabilities as a necessary condition for the establishment of a JIT.

Key challenges also to be addressed here relate to a lack of trust and a reluctance to share information between states.⁴¹ The further development of the JITs framework should come as a priority instead of adding a layer to the patchwork of actors and instruments in the EU’s counter-terrorism model, through the creation of the ECTC in Europol, for instance.

The EU should give priority to a new EU counter-terrorism and crime model that would mainly focus on what domestic actors involved in countering crime and terrorism actually need – a *criminal justice-based approach or cooperation model* in the EU. It should focus on better and more accurate use of data that meets the quality standards of evidence in criminal judicial proceedings.

More EU in these domains should be firmly anchored in its rule of law, fundamental rights and criminal justice traditions. It should not undermine Europe’s founding principles and policies related to the free movement of persons and privacy. That trust is an essential component in European cooperation and will not be gained through proposals focused on re-establishing national border controls and over-stretching current EU legal frameworks to expand surveillance of each other’s citizens and residents.

This model also should be guided by a ‘less is more’ principle when it comes to the use and exchange of data by law enforcement authorities: that is, less data retention and processing, and better and more accurate use of data that meets the quality standards of evidence in criminal judicial proceedings.⁴² Human resources and operational cross-border cooperation following a traditional (not preventive) criminal justice-led approach to crime fighting should be the essential ingredient in the EU model.

⁴⁰ These are the Convention on Mutual Assistance in Criminal Matters of 2000 and the above-mentioned Framework Decision on Joint Investigation Teams of 2002.

⁴¹ See http://ec.europa.eu/dgs/home-affairs/e-library/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf.

⁴² See D. Bigo, S. Carrera, N. Hernanz and A. Scherrer, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*, CEPS Papers in Liberty and Security in Europe, No. 78, CEPS, Brussels, January 2015; see also

Policies responding to terrorism and criminality must go hand-to-hand with the rule of law, privacy, the rights of defence and those to a fair trial and non-discrimination. Otherwise, counter-terrorism policies will defeat their purpose by generating more insecurity, instability, mistrust and legal uncertainty for all.⁴³

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⁴³ As we have argued previously (Bigo, Brouwer, Carrera, Guild, Guittet, Jeandesboz, Ragazzi and Scherrer (2015), op. cit.), counter-terrorism measures may otherwise be 'ultra-solutions' rather than actual solutions. As Watzlawick wrote ironically in 1988, an 'ultra-solution' is "a solution which is more destructive than the problem itself because it reinforces the roots of the problem and adds its own specific problems". See P. Watzlawick (1988), *Comment réussir à échouer : Trouver l'ultrasolution*, Paris: Seuil.



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