

SECILE

Securing Europe through
Counter-Terrorism: Impact,
Legitimacy and Effectiveness



THE IMPACT, LEGITIMACY AND EFFECTIVENESS OF EU COUNTER-TERRORISM

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1. Executive Summary

This report presents the key findings from the SECILE project for those engaged in the design, drafting, implementation, review and study of EU counter-terrorism. SECILE is a major, collaborative project part-funded by the FP7 programme which aims to explore the meaning of 'impact', 'legitimacy' and 'effectiveness' in the context of EU counter-terrorism, to make key recommendations for reform, and to undertake empirically-informed work on three fields of EU activity that were developed under the banner of 'counter-terrorism' (the European Arrest Warrant, databases used in border surveillance, and measures for the disruption of counter-terrorism finance).

The key findings from the SECILE project are outlined in condensed form in this report with the particular needs of policy-makers, operational end users, and researchers in mind. Links and references to fuller reports are provided throughout.

The key findings outlined in this report are:

1. Since 2001, the EU has been very active in counter-terrorism, having produced 239 counter-terrorism measures between Autumn 2001 and Summer 2013, 88 of which are 'legally binding'.
2. *Ex ante* impact assessments in the field of counter-terrorism appear to prioritise quantifiable predicted impacts (such as economic impacts) over societal impacts, including negative impacts on human rights.
3. Over the past ten years the European Parliament has often been marginalised in respect of the making and oversight of EU counter-terrorism, raising concerns as to the democratic legitimacy of such measures.
4. EU counter-terrorist measures are rarely subjected to formal *ex post facto* review. Where such review occurs it sometimes appears to exhibit a bias towards quantifiable impacts over

societal impacts and to be heavily influenced by operational perspectives.

5. The lack of systematic, participatory, evaluative review of EU counter-terrorist measures undermines their legitimacy, as well as stymying efforts to understand their impact and assess their effectiveness.
6. In some cases, measures that were introduced under the 'counter-terrorism' umbrella (eg European Arrest Warrant) are not perceived of as primarily 'counter-terrorist' by those who use and apply them, reflecting the fact that many of these measures have multiple applications and a complex provenance.

The report makes a number of key recommendations for reform, building on the research undertaken in the SECILE project.

First, it recommends that the assessment of rights-related impact be enhanced at both the *ex ante* and *ex post facto* stages. In order to achieve this, it recommends giving more appropriate weight to the views and estimations of specialist actors with responsibility for rights assessment in the European Union, as well as civil society actors, and a caution about over-weighting quantitative data over qualitative assessments. Relatedly, participation in impact assessment ought to be enhanced with as diverse a range of stakeholders as possible being involved. In this respect, key stakeholders must extend beyond industry and security experts to include civil society and specialist agencies with rights-related ambitions, although participation need not necessarily be the same at *ex ante* and *ex post facto* stages.

Second, it recommends enhanced democratic oversight of EU counter-terrorism with a greater role being played by the European Parliament in both the making and the oversight of counter-terrorist measures and policy. This may require some organisational adjustments within the

European Parliament, including empowering a committee of the Parliament to receive classified information.

Third, it recommends that transparency around the making, implementation, impact and effectiveness of EU counter-terrorism be enhanced, albeit in a manner that takes the challenges of the security context into account.

Fourthly, the report recommends that, in the case of all EU counter-terrorism, systematic review ought to be introduced in order to 'close the loop'.

Ensuring systematic and evaluative review of the making, operation and impact of counter-terrorism is key to understanding its impact, enhancing its legitimacy, and assessing its effectiveness. All such reviews ought to critically assess the impact and effectiveness of the measures, taking the perspectives of a wide range of stakeholders on board. They ought to be regular, participatory, public (to the extent possible and bearing in mind the challenges of transparency in the security context), and capable of bringing about policy, legal, practical and political reorientation by providing a rigorous evidence base for policy (re)evaluation.

2. About SECILE

SECILE (Securing European through Counter-Terrorism: Impact, Legitimacy and Effectiveness) is an FP7-funded, collaborative project the results from which are presented in full on the project website: www.secile.eu

SECILE combines research partners with academic, military, judicial, practical and industry expertise. Led by Professor Fiona de Londras in Durham University (UK), the consortium consists of the Centre for Irish and European Security, King's College London, the National Maritime College of Ireland, the Peace Research Institute Oslo, Statewatch, and the Supreme Court of Latvia.

The main goal of SECILE was to provide an empirically-informed, multi-stakeholder understanding of how the impact, legitimacy and effectiveness of European counter-terrorism measures might best be measured and understood. In the fulfillment of this objective the project placed particular emphasis on gathering and understanding practical experiences of implementing and assessing these measures.

SECILE met these objectives by:

- Cataloguing counter-terrorism legislation introduced at EU level since September 2001 in order to provide a comprehensive record of the degree to which the EU is engaged in counter-terrorism, mapping the potential scope of the project and the field.
- Producing a comparative report on the transposition of EU measures in member states in order to record the differing transposition mechanisms and assess whether, through transposition, the measures promulgated at EU-level might be imposed inconsistently across the Union with a view to assessing uniformity.
- Identifying whether there are any mechanisms within the EU laws and policies themselves that are intended to measure the impact, legitimacy and effectiveness.
- Rigorously deriving an understanding of the state of the art in legal, societal, operational and democratic terms on measuring and conceptualising the impact, legitimacy and effectiveness of counter-terrorism measures generally and in the EU specifically.
- Systematically considering the impact of selected measures in the EU and extracting understandings of current gaps in knowledge and perspectives by means of in-depth case studies.
- Engaging stakeholders and undertaking wide dissemination of research results in order to increase awareness among relevant EU and domestic actors of key insights on the impact, legitimacy and effectiveness of EU counter-terrorism.

3. Methodology

The SECILE project was carried out in three main phases.

Phase 1 was a stocktaking phase. This comprised, firstly, the preparation by Ben Hayes and Chris Jones of Statewatch of a comprehensive catalogue of EU counter-terrorism measures adopted since 11th September 2001 in order to determine the current legal status of counter-terrorist law generated at EU level. In addition, Hayes and Jones prepared a report on the transposition of the 88-EU counter-terrorism measures requiring transposition, a report on how the EU assesses the impact, legitimacy and effectiveness of its counter-terrorism laws, and a case study of the EU's Data Retention Directive to illustrate the general findings in this work-package.

The second element of the stock-taking phase was the assessment of paradigmatic under-

standings of impact, legitimacy and effectiveness in legal, operational, societal and democratic terms. In this respect four reports were prepared. Méderic Martin-Maze of the Peace Research Institute Oslo (PRIO) prepared a report on the concepts of impact, legitimacy and effectiveness from a societal perspective. Fiona de Londras and Josephine Doody of Durham University and Erika Downing of the National Maritime College of Ireland explored the operational challenges and perspectives in counter-terrorism. Yulia Chistyakova of Durham University considered impact, legitimacy and effectiveness in relation to both theory and in the practice of democratic institutions within the EU member states. Mathias Vermeulen, Daniel Deering and Sadhbh McCarthy of the Centre for Irish and European Security considered the ways in which law understands the concepts of impact, legitimacy and effectiveness in counter-terrorism.

Ben Hayes & Chris Jones

Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2001

Ben Hayes & Chris Jones

Report on the Transposition of EU Counter-Terrorism Measures

Ben Hayes & Chris Jones

Report on how the EU assesses the impact, legitimacy and effectiveness of its counter-terrorism laws

Ben Hayes & Chris Jones

The EU Data Retention Directive: A Case Study of the legitimacy and effectiveness of EU counter-terrorism policy

Fiona de Londras, Josephine Doody, Signe Zalkalne, Janis Supe

Cross-Disciplinary Perspectives on Impact, Legitimacy and Effectiveness in the Content of EU Counter-Terrorism

Mathias Vermeulen, Sadhbh McCarthy, Daniel Deering

Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism

Fiona de Londras, Josephine Doody, Erika Downing

Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism

Yulia Chistyakova

Democratic Perspectives on Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context

Méderic Martin-Mazé

Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context

Bringing these reports together, Fiona de Londras and Josephine Doody of Durham University and Janis Supe and Signe Zalkalne of the Supreme Court of Latvia identified the cross-disciplinary perspectives of impact, legitimacy and effectiveness building on the insights of the operational, legal, democratic and societal perspective reports.

Phase 2 was an empirical phase. This comprised, firstly, of three case studies undertaken primarily by the research team at King's College London: the European Arrest Warrant, EU border control databases, and counter-terrorist financing. This included three focus groups with law enforcement officers and other end users involved in the implementation of these measures across Europe.

The findings of those focus groups and their broader implications are outlined in three reports co-authored by Cian C. Murphy, Aldo Zammit Borda, and Lucy Hoyte. In addition, the Peace Research Institute Oslo, assisted by Durham University, held a focus group with a small sample of civil society actors from across Europe to discuss these same measures. The results of this focus group and their broader implications are outlined in a report by Rozemarijn Van der Hilst. Finally in this phase, the research team at Durham University undertook ten semi-structured interviews with key policy-makers on these counter-terrorism measures as well as on EU counter-terrorism in a broader sense. The results of these interviews and their broader implications are outlined in a report by Fiona de Londras & Josephine Doody.

Rozemarijn Van der Hilst
Civil Society Perspectives on the Impact, Legitimacy and Effectiveness of European Counter Terrorism Measures

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte
Law Enforcement Officers' Perspectives on Impact, Legitimacy and Effectiveness of EU Border Control Databases

Fiona de Londras & Josephine Doody
Policy-Maker Perspective on Impact, Legitimacy and Effectiveness in EU Counter-Terrorism

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte
Counter-Terrorism Finance Operatives' Perspectives on Impact, Legitimacy and Effectiveness of EU Counter-Terrorism Finance Law and Policy

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte
Prosecutors' and Government Officials' Perspectives on the Impact, Legitimacy and Effectiveness of the European Arrest Warrant

The final stage, a synthesis stage, brought the results of the stock-taking and empirical phases together to identify broader lessons, implications for EU counter-terrorism, conceptualisations of the key concepts, and proposals for reform. These proposals are outlined in this report, and this phase

of the work will also lead to the publication of an edited collection (Fiona de Londras & Josephine Doody (eds), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (2015; Routledge), forthcoming).

4. Key Findings from the Stocktaking Exercise: Scale of EU Counter-Terrorism

A core element of SECILE’s work was to undertake a comprehensive stocktaking exercise in respect of EU counter-terrorism. This work, undertaken by Ben

Hayes and Chris Jones, found that between 2001 and 2013 the EU had introduced 239 counter-terrorism measures, 88 of which were ‘binding law’.¹

INSTRUMENT	QUANTITY (+DRAFTS)	PURPOSE, IMPACT
Action plans and strategy documents	26	Sets the EU counter-terrorism agenda through legislative and/or operational programmes that represent a political commitment on the part of EU member states, institutions and agencies to develop and implement specific policies, legal measures or frameworks for cooperation.
Regulations	25 (+13)	Legal acts that apply directly without requiring national laws to implement them (though states are free to transpose as long as effect is same). All EU institutions, member states and individuals must comply with Regulations.
Directives	15 (+8)	Legal acts that are binding on the member states in terms of the results to be achieved but leave to the discretion of national authorities the methods by which these results may be achieved.
Framework Decisions	11	Legally binding acts used exclusively in the fields of police and judicial co-operation in criminal justice matters between 1999 and 2009. Similar in effect to Directives insofar as they require member states to achieve particular results without dictating the means of achieving those results.
Decisions	25 (+4)	Legally binding acts that may have “general application” (in which case all member states must take steps to comply) or be directed at specific addressees (meaning only those subject to the Decision must comply).
Joint Actions	1	Legally binding instruments under the Common Foreign and Security Policy that provide for the deployment of financial and/or human resources to achieve a specific objective. May also lay down basic rules on how such initiatives should be implemented.

¹ Ben Hayes & Chris Jones, *Catalogue of EU Counter-Terrorism Measures (SECILE Consortium, 2013)*

INSTRUMENT	QUANTITY (+DRAFTS)	PURPOSE, IMPACT
Common Positions	3	Legally binding agreements between the member states on the position to be taken with regard to international matters such as strategic relations with third countries, negotiating positions in international fora or the domestic (EU) interpretation of international laws and conventions.
Recommendations	11	Not legally binding but representative of a political commitment on the part of EU institutions/bodies or member states toward specific conduct or outline the goals of a common policy.
Resolutions	4	Not legally binding but used to signify political agreement to act in a given area.
Conclusions	111	Not legally binding but used exclusively by the EU Council to set the policy agenda by signifying political agreement among the member states as to the type, nature or content of specific measures.
International Agreements	8	Legal effect varies according to the type and nature of the agreement. In the area of counter-terrorism EU treaties have been establish framework for member state police, judicial and customs cooperation with the USA as well as to provide a legal basis for the transfer of personal data from the EU to third states.
TOTAL	239 (+25)	

An analysis of how the question of impact is folded into the process of making, maintaining and assessing these measures then followed.² This analysis found that while *ex ante* impact assessment by the Commission is becoming more systematic, the concentration given to rights-related considerations can be unsatisfactory. It also raised a concern that such impact assessments might be read as effectively 'selling' a policy rather than clearly outlining the relative impact implications of a variety of policy options. Significant concern was, thus, raised about the extent to which such *ex ante* impact assessments undertaken by the Commission effectively take

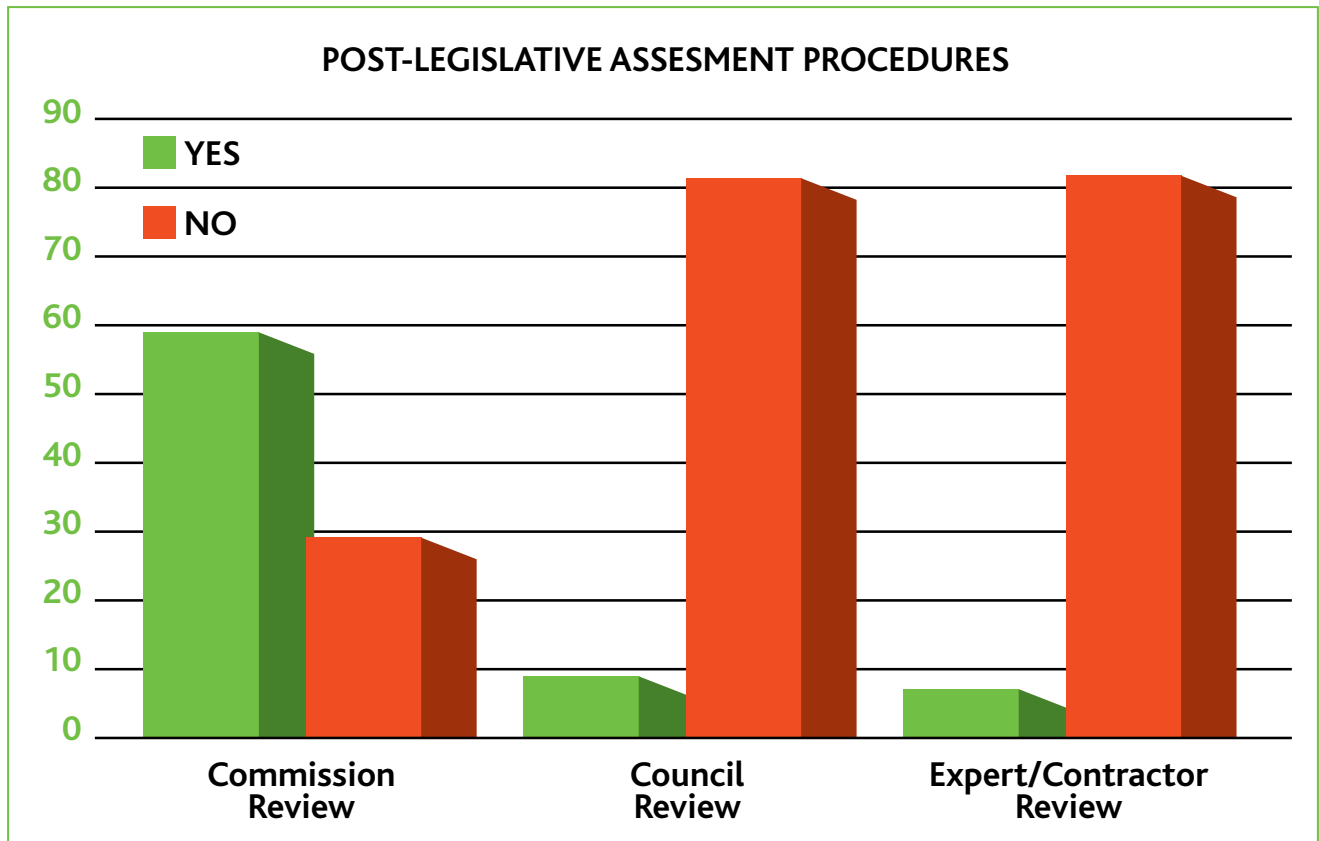
account of societal impact, particularly relating to rights. While advisory bodies' involvement at the *ex ante* phase can bring rights-related issues more effectively to the fore, their reports and opinions do not bind the political and policy-making process and the research found that it is not always clear that they have a discernible effect on decision-making.

Furthermore, where policies have been pursued through the introduction of legally binding counter-terrorism measures, this analysis found that the *ex post facto* reviews - where they happen - tend to be heavily operational in their focus, so

² Ben Hayes & Chris Jones, *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of its Counter-Terrorism Laws* (SECILE Consortium, 2013).

that societal impact remains under-explored. This is when these reviews take place at all: although 59 of the 88 legally binding measures contain review clauses, these reviews rarely take place in practice. Where they do - whether by the Commission, the

Council or an externally contracted agent - they tend to focus on transposition and implementation in a relatively formal sense, rather than to consider the operation and impact of the measures in the round.



Beyond these formal reviews, measures are sometimes also subjected to peer review where states engage in a system of shared review, reflection and learning as to the operation of EU counter-terrorism measures, but this review is also heavily operational in its perspective. Similarly, although to a somewhat lesser extent, the reports of the Counter-Terrorism Coordinator were found to be substantively oriented towards assessing the 'state of play' and the operation of measures and not on the societal and rights-related impacts of EU counter-terrorism measures.

Thus, while there are various actors and stages of impact review in the EU counter-terrorism context, this stocktaking exercise suggested that these reviews appear to have a particular operational orientation and/or focus on technical

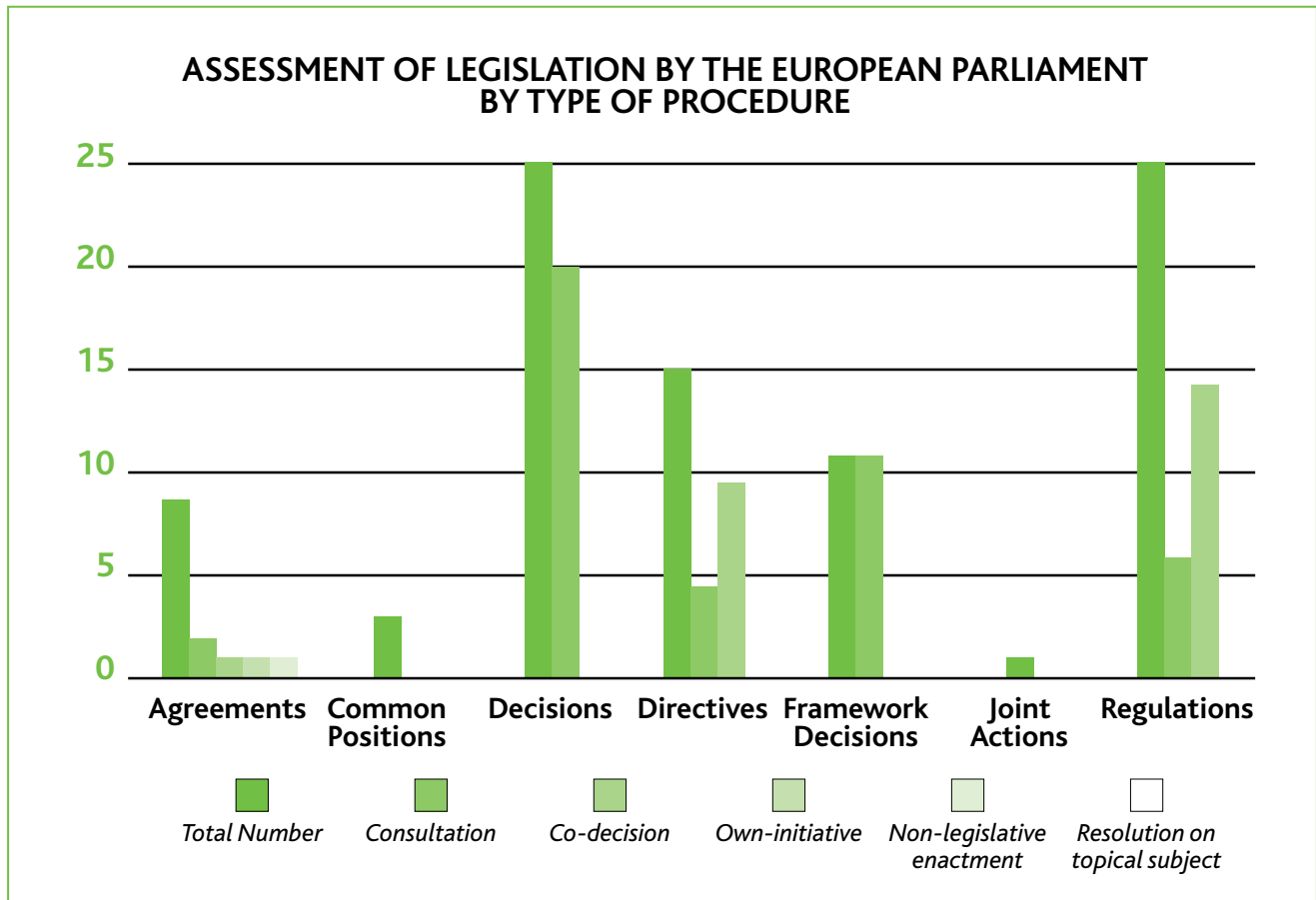
questions of transposition and implementation so that, apart from analyses by entities established with a specific rights-relation remit, questions relating to the societal impact of counter-terrorist measures, and particularly to implications for rights, risk being marginalised and under-considered.

Hayes and Jones also undertook an analysis of how the question of legitimacy is dealt with in the processes of making, maintaining and assessing these measures.³ As well as concerns as to review outlined above, a key legitimacy consideration raised relates to process. This stocktaking exercise found that the involvement of the European Parliament has not always been substantive in respect of EU counter-terrorism measures; a finding that must be contextualised by the pre-Lisbon constitutional

3. Ben Hayes & Chris Jones, *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of its Counter-Terrorism Laws* (SECILE Consortium, 2013).

arrangement vis-à-vis the Parliament. Prior to the Lisbon Treaty coming into effect, many EU counter-terrorism measures were adopted under the 'Third Pillar' in relation to which the Parliament had a limited role. Of the 88 legally binding counter-terrorist measures identified as having been adopted between 2001 and 2013, the report finds that 70 were the subject of deliberations in European

Parliament, although in 44 of these cases the deliberation took place at consultation phase only. Co-decision had taken place in relation to only 23 measures. This lack of involvement of the European Parliament is exacerbated by the relatively closed nature of much counter-terrorist decision-making, notwithstanding the EU's general commitment to more open policy-making processes.



Thus, overall the stocktaking exercise identified a number of critical concerns relating to effectiveness. First, one third of the legally binding counter-terrorism measures introduced since 2001 did not include any provisions for review. In addition, there was a failure to produce or publish a quarter of the reviews that were mandated by the remaining legislation. This is notwithstanding the fact that transposition is carefully monitored, suggesting a concern with implementation rather than effectiveness or a conflation of implementation and effectiveness. Furthermore, throughout the evaluation processes that have

been carried out, much greater weight appears to have been ascribed to the needs and assessments of law enforcement and security agencies than the views of other "stakeholders" within the EU. Finally, the "full and detailed evaluation" of EU counter-terrorism policy requested by the European Parliament in 2011 is long overdue. The majority of the EU's counter-terrorism legislation has not been subjected to the kind of scrutiny that should be expected of laws that can have such a significant impact upon individuals and public and private institutions.

5. Key Findings from the Stocktaking Exercise: Disciplinary Perspectives

5.1 Understanding Impact

In his report on societal impact, Méderic Martin-Mazé defines impact in a general sense as being 'the effect yielded by a specific measure',⁴ emphasising that in understanding such effects one must be cognisant of the unevenness of impact across both societal groups and societal values. This general concept of impact makes it clear that a comprehensive understanding of a measure's societal impact requires a multi-layered approach that identifies and takes into account its effects across a number of different referents. The first important referent from the perspective of societal impact, then, is who is experiencing the effect. A second referent identified from the societal perspective is that of societal values. Here, again, the impact may appear different depending on which societal value is taken as the referent. A measure might, for example, be identified as increasing security but simultaneously increasing levels of state surveillance. This emphasises that in order for a measure's societal impact to be appreciated a second referent must be taken into account: what is being affected. Measuring societal impact is, thus, a complex matter that requires an appreciation of the effects of the counter-terrorism measure on both a range of societal groups and all relevant societal values.

In their report on the legal perspective, Mathias Vermeulen, Daniel Deering and Sadhbh McCarthy define impact as the negative effect of a counter-

terrorism measure on the protection of legally enshrined rights.⁵ The relevant referent in an impact assessment is law itself, which can be understood in three different dimensions: the law as it applies to suspected terrorists directly affected by the measure, the law as it applies to all others, and the Rule of Law in a more general and intangible sense. Vermeulen et. al. draw a distinction between the direct and indirect impact of counter-terrorist measures, meaning the effect of the measure on the legal status of those upon whom it is applied (direct impact) and its effect beyond that (indirect impact). As regards the first dimension it is clear that counter-terrorist measures can have direct impacts on suspected terrorists by, for example, providing that they are to be subjected to a restrictive measure without what would normally be considered to be due process or an adversarial trial process. An additional indirect effect arises from what Fenwick and Phillipson⁶ deem the 'covert derogation' from human rights norms and de Londras⁷ terms a general 'downward calibration' of legal protections. This reflects a general reduction in the level of rights protection including for those not suspected of involvement in counter-terrorism as a result of the counter-terrorist malaise, which can result in courts and political actors accepting that security concerns require an adjustment in our 'normal' standards of legal protection. As a general matter, it is accepted that counter-terrorism measures have legal impacts, manifested in the existence of a legally defined period of emergency in which 'normalcy' is suspended in order for the

⁴ Méderic Martin- Mazé, *Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013), pg.5 <http://secile.eu/societal-perspectives>

⁵ Mathias Vermeulen, Daniel Deering & Sadhbh McCarthy (with research assistance from Carolin Möller), *Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <http://secile.eu/report-legal-understandings>

⁶ Helen Fenwick and Gavin Phillipson (2011) 'Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond', *McGill law journal*, 56 (4), pp. 863-918.

⁷ Fiona de Londras (2011) *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: Cambridge University Press).

⁸ Fionnuala Ni Aolain and Oren Gross (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press). See chapters 1 and 5.

state to take actions that would otherwise violate constitutional and/or human rights standards,⁸ the so-called 'emergency/normalcy dichotomy'. In both cases the question asked by law is not whether there are any impacts at all, but whether those impacts are permissible in terms of what the law regards to be acceptable levels of interference with the status quo ante as measured by legal doctrines such as proportionality, the margin of appreciation and so on.

In her report on the democratic perspective, Yulia Chistyakova considers that the impact of counter-terrorism can be understood as its effect on democracy, understood as the democratic principles of the relevant political system, governance practice and the demos.⁹ It is clear that the democratic perspective conceptualises impact across three referents: the relevant political system, practices of governance, and the demos itself. In the case of EU counter-terrorism, the relevant political system is the European Union itself. The EU's democratic principles are those identified in the Treaty of the European Union, namely the indivisible, universal values of human dignity, freedom, equality and solidarity based on the principles of democracy and the rule of law.¹⁰ The report makes it clear that understanding impact by reference to democratic principles requires an assessment of both the impact of the measures in question on the maintenance of these principles and the impact of a climate of counter-terrorism on our understanding of the content of and a commitment to these principles. In this respect, it must be recalled that recourse to the exceptionalism debate and the prioritisation of security over liberty can lead to a reframing of democracy and radical adjustment in our understanding of its core content. As well as

impacting on our understanding of and adherence to core democratic principles, a further impact of counter-terrorism from the democratic perspective can manifest itself in governance practices. These include the practice by which measures are introduced, debated, justified and assessed. As noted by Sjursen,¹¹ and cited in the report,¹² the extensive use of flexibility mechanisms and the employment of secrecy and urgency procedures associated with the adoption of CT measures tend to create greater distance, or 'remove' policies and processes from citizens' influence. As a result, decision-making becomes less transparent and accountable and the link between the measures and democratic authorisation less tangible. The third referent from a democratic perspective is impact on the demos itself, particularly in relation to the restrictions on civil liberties and human rights and the uneven distribution of those restrictions across societal groups and, indeed, civil society organisations.

In their report on the operational perspective, de Londras, Doody and Downing argue that impact might be understood as the effect that operationalisation of counter-terrorist measures (understood as a process by which abstract or imprecise commitments, principles, measures and policies are translated into 'on the ground' action) has on the operational framework.¹³ In each of these areas impacts can be uneven, positive or negative. From an operational perspective, the impact of EU counter-terrorism may be national or transnational. In both respects, impact might be understood as the effect that operationalisation has on the operational framework, on roles, and on resources. At a national level the impact of operationalisation for the operationalising institution may, then, be empirically measurable

⁹ Yulia Chistyakova, *Report on Democratic Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013) <<http://secile.eu/democratic-perspectives>>

¹⁰ Article 6(1) of the TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000. The preamble states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'.

¹¹ Helene Sjursen (2011) 'Not so intergovernmental after all? On democracy and integration in European Foreign and Security Policy', *Journal of European Public Policy*, 18(8), pp. 1078-1095.

¹² Yulia Chistyakova, *supra* note 6, p. 21.

¹³ Fiona de Londras, Josephine Doody & Lt. Cdr. Erika Downing, *Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <<http://secile.eu/report-on-operational-perspectives>>

inasmuch as a cost may be calculable. Operationalisation can also create impact at the European level, which might again be understood in terms of operational frameworks, roles and resources. The operationalisation of EU counter-terrorism law and policy may require leadership

from one of more EU agencies and lead to the creation of new institutions or offices. It may also bring about either harmonisation or fragmentation of frameworks and systems used for particular purposes within the EU.

Bringing all of these perspectives together, the project reached the following conclusions:

- Impact relates to the effect or consequence a counter terrorism measure has.
 - Impact must be understood in relation to relevant referents.
 - Impact can be positive or negative; the same measure can have both positive and negative impacts across different referents.
 - Impact can be direct or indirect.
 - Impact can be temporally-variable, changing in extent and nature depending on context
- (e.g. whether in a period of emergency or normalcy).
 - In order for impact to be comprehensively understood, direct and indirect impacts should be measured against multiple referents, which in turn should include societal groups, institutions, societal values and principles (such as democratic principles and the Rule of Law).

5.2 Understanding Legitimacy

In his report on societal impact, Méderic Martin-Mazé argues that the concepts of legitimacy and effectiveness are difficult to disentangle from a societal perspective.¹⁴ This is because of the strong relationship between (perceived) effectiveness and (perceived) legitimacy. From a societal perspective, the focus is on the concept of effective legitimacy explained within this report as 'a bi-faceted concept, where the input of procedural validation meets the output of effective results' (measured by a results-based evaluation).¹⁵ In other words, a measure developed through an acceptable policy-making process that achieves results is legitimized. It has gained effective legitimacy. Thus, from a societal perspective legitimacy as a concept is heavily dependent on effectiveness as (alleged or perceived) effectiveness is a key mechanism for legitimation;

the more effective a measure is said to be the more legitimate it may be perceived as being.

In their report on the legal perspective, Mathias Vermeulen, Daniel Deering and Sadhbh McCarthy outline two general concepts of legitimacy: descriptive legitimacy and normative legitimacy.¹⁶ Descriptive legitimacy refers to 'people's beliefs about political authority and, sometimes, political obligations'. The normative concept of legitimacy refers to 'some benchmark of acceptability or justification of political power or authority and – possibly – obligation'.¹⁷ From this a distinction between lawfulness and legitimacy can be drawn, recognising that a measure might be lawful but considered illegitimate. The report draws on work by de Londras, who identifies four factors that can determine the legitimacy of a counter-terrorism measure: the existence of a public justificatory

¹⁴ Méderic Martin- Mazé, *Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013), <http://secile.eu/societal-perspectives>

¹⁵ *Ibid*, pg. 7.

¹⁶ Mathias Vermeulen, Daniel Deering & Sadhbh McCarthy (with research assistance from Carolin Möller), *Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <http://secile.eu/report-legal-understandings>

¹⁷ *Stanford Encyclopedia of Philosophy*, 'political legitimacy': <http://plato.stanford.edu/entries/legitimacy/>

deliberation, non-discrimination, meaningful review, and temporal limitation of a given measure.¹⁸

In her report on the democratic perspective, Yulia Chistyakova distinguishes between output and input legitimacy, consisting of the effective protection of EU citizens against terrorism, on the one hand, and the equal participation of citizens in the legislative decision-making process on the other.¹⁹ Output legitimacy here is Hobbesian in its perspective, considering a state's security measures to be legitimate when they can be seen to be effective in providing individual and collective security. Input legitimacy, more liberal in its approach, relates to procedural criteria or requirements for determining the popular will, including majoritarianism, citizen representation and the representation of interest groups and networks. A third criterion of democratic legitimacy advocated by Schmidt²⁰ is 'throughput' legitimacy judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people.

In their report, de Londras et. al. note that operational perspectives on legitimacy²¹ may be connected to both process (or input) and output legitimacy. In terms of process legitimacy, the extent to which the creation of an EU counter-terrorist law or policy that must then be operationalised has been generated in appreciation of an existing need—as opposed to as a political matter—is likely to be taken into account when its legitimacy is being assessed by an operationalising entity. This is at least partially because, where the policy is created for political rather than operational reasons, it is likely to be especially vague in its nature requiring substantial innovation and resource allocation by European and/or national authorities in order for operationalisation to take place. In other words, the degree to which the operationalising process of translation is onerous may be influenced by the process by which the measure or policy was generated. In contrast, regardless of the process by which the measure of policy was generated there is likely to be a concern with output legitimacy which, in turn, may address the workability of the measures required or obligations imposed. This is arguably connected to

Bringing all of these perspectives together, the cross-disciplinary report reached the following conclusions:

- Legitimacy is a nebulous term that can be said to comprise of numerous different strands including input legitimacy, process legitimacy, output legitimacy, outcome legitimacy, effective legitimacy, descriptive legitimacy and normative legitimacy.
- There is a close relationship between effectiveness and legitimacy in the counter-terrorist context, as measures that are perceived as effective are likely to enjoy enhanced perceived legitimacy.
- Processes of legitimisation in the counter-terrorist context can include the deployment of narratives such as those of exceptionalism, balance and trade-off.
- Procedural and substantive mechanisms - such as sunset clauses - may be employed in an attempt to enhance legitimacy, including in politico-legal processes.

¹⁸Fiona de Londras (2011) 'Can counter-terrorist internment ever be legitimate?', *Human Rights Quarterly*, 33 (3), pp. 593-619.

¹⁹Yulia Chistyakova, *Report on Democratic Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013) <http://secile.eu/democratic-perspectives>

²⁰Vivien Schmidt (2013), 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', *Political Studies* 61(1), pp 2-22.

²¹Fiona de Londras, Josephine Doody & Lt. Cdr. Erika Downing, *Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <http://secile.eu/report-on-operational-perspectives>

the extent to which the measure(s) answer general operational needs such as clarity of obligation, non-duplication, incentivisation of cooperation and coordination, and information sharing, which in turn may be enhanced by ensuring the participation of operational actors in the process of generating the measure/policy/output in the first

place. Thus, legitimacy might be understood as referring to the workability of the measure/policy/obligation when seen from the perspective of the entity or entities required to operationalise it, where the extent to which operational needs are addressed is taken into account.

5.3 Understanding Effectiveness

In his report on societal effectiveness, Méderic Martin-Mazé defines effectiveness by reference to the extent to which a measure's results align with those that were expected.²² Effectiveness is determined by whether the measures 'actually make a difference',²³ and from a societal perspective a measure's effectiveness can be positive or negative (i.e. a measure can be counter-productive). Experience shows that *ex post facto* evaluations tend to focus on outputs rather than on impact per se so that the so-called effectiveness analysis risks excluding key societal indicators. Furthermore, societal representations of the effectiveness of counter-terrorist measures are heavily influenced by three key arguments, prominent in politico-legal discourse: the exception argument, the metaphor of a balance between security and liberty, and the trade-off model. These arguments frame societal perceptions of effectiveness and thus present a further challenge to rigorous analysis. The societal approach proposes a move to analysing effectiveness across an output-outcome-impact trichotomy. According to this, output-effectiveness 'investigates the features characteristic of a given counter-terrorist framework'.²⁴ The adoption of a measure in response to a threat would be considered an output. Outcome-effectiveness 'brings under

examination the compatibility of that which is delivered by the policy framework with the provisions that are built into its design'.²⁵ Finally, impact-effectiveness 'tackles this issue pertaining to the behaviour of the targeted audience'.²⁶

As outlined by Vermeulen et. al. in their legal report,²⁷ effectiveness is not usually something that legal analyses take into particular account (in contradistinction to necessity, proportionality and legality). Rather, effectiveness might be understood in terms of the production of an intended result, such as expedition of the prosecution of suspected terrorists or the freezing of suspected terrorists' assets. Although, as outlined in detail in the report, the ECtHR does not usually expressly assess the effectiveness of impugned counter-terrorist measures, it does consider whether a measure is 'necessary in a democratic society' and/or limited to that which is 'strictly required by the exigencies of the situation'; an assessment that might implicitly take effectiveness into account. However, as the report outlines in some detail, the ECtHR tends to take a quite deferential approach (in respect of both national courts and national governments) in cases relating to counter-terrorism.

From a democratic perspective, effectiveness is also connected with the extent to which measures

²² Méderic Martin- Mazé, *Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context*, pg. 5 (SECILE Consortium, 2013) <http://secile.eu/societal-perspectives>

²³ *Ibid*, pg. 22.

²⁴ *Ibid*, pg. 24.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ Mathias Vermeulen, Daniel Deering & Sadhbh McCarthy (with research assistance from Carolin Möller), *Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <http://secile.eu/report-legal-understandings>

achieve their intended effects.²⁸ Thus, Chistyakova notes that effectiveness is closely connected with output legitimacy, inasmuch as that which is seen to be 'working' is perceived as having enhanced legitimacy. However, effectiveness is problematic as a concept within EU counter-terrorism from a democratic perspective for a number of reasons. Firstly, the effective measurement of counter-terrorist measures' effectiveness is frustrated by a lack of information sharing within and across the EU inasmuch as European agencies are heavily reliant on information and capacities that remain largely within the domestic domain of member states. Secondly, EU counter-terrorism measures can have what Schneider et. al. term 'second-order' effects that are often overlooked.²⁹ For example, CT efforts might divert public spending away from other activities, including security-oriented ones, or result in changed foreign policy priorities or practices. Where these second-order effects are overlooked it is difficult to tell whether counter-terrorism measures are actually effective. It is not

clear whether the measures achieve their aims or whether they have perhaps led to transference or substitution effects.

In their report de Londras et al note that from an operational perspective effectiveness appears to be connected with the extent to which the objective that was to be achieved by means of introducing the measure or policy has actually been achieved.³⁰ Effectiveness here seems, thus, to be a non-abstract matter; rather it is measurable. However, this requires that a clear rationale for the measure or policy in question ought to have been outlined; one the satisfaction of which can in fact be assessed in a meaningful way. In addition, it requires there to be a way of measuring this effectiveness, most likely by means of a monitoring mechanism. Thus, from an operational perspective effectiveness might be understood as the satisfaction at operational level(s) of the original objectives that were to be achieved by the introduction of the EU policy or measure.

Bringing all of these perspectives together, the cross-disciplinary report reached the following conclusions:

- Across all surveyed fields effectiveness relates broadly to the extent to which a measure achieves its intended outcomes.
- Assessing and understanding effectiveness requires clear identification of a measure's intended outcomes.
- Measuring or assessing effectiveness from societal, legal and democratic perspectives poses particular challenges because of information deficits and/or monopolisation, a failure to take second order effects into account, the conflation of compliance with effectiveness within official monitoring mechanisms, and institutional limitations.
- Effectiveness may be more susceptible to measurement from an operational perspective where the intended outcomes are clearly defined.
- Operationally, effectiveness relates to the extent to which an objective has actually been achieved and is measurable through monitoring mechanisms.
- There is a clear connection between effectiveness and outcome legitimacy, inasmuch as measures that are seen to be effective are likely to be perceived as having enhanced legitimacy from an outcome perspective.

²⁸ Yulia Chistyakova, *Report on Democratic Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013) <http://secile.eu/democratic-perspectives>

²⁹ Friedrich Schneider, Tilman Brück and Daniel Meierrieks, (2010) 'The Economics of Terrorism and Counter-Terrorism: A Survey (Part II)', *CESifo Working Paper Series No 3012* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590148.

³⁰ Fiona de Londras, Josephine Doody & Lt. Cdr. Erika Downing, *Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <http://secile.eu/report-on-operational-perspectives>

6. Insights from the Case Studies

As part of SECILE case studies were undertaken in relation to three areas of EU-led activity that were introduced under the rubric of 'countering terrorism'. These are the European Arrest Warrant, border control databases, and measures to disrupt counter-terrorist financing. Although these measures and areas of activity are not all terrorism-

specific, they were all introduced in relation to stated counter-terrorist goals and activities. The case studies involved engagement with operational end users (i.e. those who implement relevant measures in practice), policy-makers, and civil society representatives.

6.1 European Arrest Warrant

Perspectives of Operational End Users: Impact of the European Arrest Warrant

The views of prosecutors and government officials who participated in SECILE in respect of the European Arrest Warrant are presented in full in the report Prosecutors' and Government Officials' Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant.³¹ Prosecutors and government officials who participated in the focus group on the European Arrest Warrant (EAW) shared the view that the EAW had a positive impact on criminal justice co-operation in general and their discussion highlighted the broader effect of the measure following the events of September 11 2001. Participants emphasised that the EAW is not primarily a counter-terrorism measure but a necessary corollary of the free movement of individuals within the European Union. Participants agreed that the European Arrest Warrant potentially had a (negative) impact in the displacement of crime.

Perspectives of Operational End Users: Effectiveness of the European Arrest Warrant

Prosecutors and government officials who participated in the focus group on the European Arrest Warrant (EAW) discussed the challenges to the effectiveness of this measure, particularly safeguards for those who are subject to EAW

requests and refusal to execute EAW requests on human rights grounds. Some participants demonstrated skepticism around the idea of requests being challenged in court on human rights grounds. Participants recognised that the EAW both requires mutual recognition based on mutual trust and contributes to such mutual recognition and trust. Effectiveness was considered in terms of whether a speedy surrender was possible and participants largely agreed that the EAW is an effective measure contributing to the process of bringing suspects to trial. Participants in this discussion linked effectiveness to the concept of legitimacy.

Perspectives of Operational End Users: Legitimacy of the European Arrest Warrant

Prosecutors and government officials who participated in the focus group on the European Arrest Warrant (EAW) identified the existence of an appropriate legal framework as the starting point to measuring legitimacy. Participants considered a number of themes in relation to assessing legitimacy, particularly legal, rational (in accordance with a rational or reasonable policy goal), and social legitimacy, whilst recognising that legality alone is not sufficient to ensure legitimacy. Participants noted the importance of considering how those who are subject to the system view the measure as a means of assessing social legitimacy. The need for proportionality in enforcement was also recognised as an important element in ensuring overall legitimacy

³¹ Cian C. Murphy, Aldo Zammit Borda & Lucy Hoyte, *Prosecutor and Government Officials Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant (SECILE Consortium, 2014)* <http://secile.eu/operational-perspectives-eu-counter-terrorism-action/>

Civil Society Perspectives

Civil society participants were generally less enthusiastic about the EAW than were operational end users. The civil society participants discussed the need for more quantitative data on the application of the European Arrest Warrant in order to understand its practical impact but noted that relying only on 'figures' in measuring impact would exclude important societal elements of an impact assessment. Participants explored positive impact in the context of the measure facilitating states in arresting an individual who has crossed an EU border. Civil society focus group participants felt the effectiveness of this measure might also be considered in light of the practical harmonisation of rules and legislation across member states. Participants also discussed the need to consider a cost-benefit analysis of the measure to determine whether it is effective, which assessment should be undertaken in a manner that includes discussions with stakeholders. Participants identified timing, procedure and motivation as important issues when assessing the legitimacy of the EAW. In this respect, participants raised concerns as to the timing of the measure's final introduction following events such as 11 September 2001, which gave rise to the perception that it was motivated by the attacks, even though the proposal for the EAW predated '9/11'. Thus, the process by which the measure was introduced and an understanding of

driving forces behind it were recognised as being important to legitimacy. It was also noted that the ways in which a measure is used, and transparency in relation to its usage, might influence perceptions of its legitimacy.

Policy-Maker Perspectives

From the ten policy-makers and high-level operational actors in European institutions interviewed for SECILE, the impression of the European Arrest Warrant was largely positive in relation to the measure's original policy objectives. It was recognised that the measure has succeeded in speeding up extradition between Member States, thus addressing delays in extradition which had previously been a cause for concern. The European Arrest Warrant was also recognised as contributing to the development of a European judicial space and better coordination between member states. One interviewee noted that figures on the use of European Arrest Warrant system made a quantitative analysis of the effectiveness of the measure relatively straightforward although a cautionary note was sounded by another interviewee as to the usefulness of statistical analysis when measuring effectiveness. Whilst policy-makers and operational actors recognised the contribution of the European Arrest Warrant to cross-state joint exercises it was noted that a review of the measure's operation may be timely.

6.2 EU Border Control Databases

Perspectives of Operational End Users: Impact of EU Border Control Databases

The views of law enforcement officers who participated in SECILE in respect of border control databases are presented in full in Law Enforcement Officers' Perspectives on Impact, Legitimacy and Effectiveness of EU Border Control Databases.³² Law enforcement officers who participated in the focus group on EU border control databases generally considered that EU

border control databases made Europe more secure and aided law enforcement officers in carrying out their roles, although they were not sufficient on their own. A number of participants raised concerns as to deployment of the correct databases, training, and the increasing complexity of databases: factors that might undermine their positive impact on European security. A number of participants represented these databases as being a corollary of the free movement of people; a view that was shared by at least one policy-maker (see below).

³² Cian C. Murphy, Aldo Zammit Borda & Lucy Hoyte, *Law Enforcement Officers Perspectives on Impact, Legitimacy and Effectiveness of EU Border Control Databases (SECILE Consortium, 2014)* <http://secile.eu/operational-perspectives-eu-counter-terrorism-action/>

Perspectives of Operational End Users: Effectiveness of EU Border Control Databases

Law enforcement officers who participated in the focus group on EU border control databases had differing opinions on the effectiveness of these databases. In terms of effectiveness, participants stressed the need to make clear what databases one was talking about as there is a wide array of public and private databases that might be accessible to law enforcement. Building on this, participants noted that the range of databases was expanding, introducing increasing complexity. Training and experience in using databases were, thus, stressed as key to their effectiveness. Although training and experience were identified as key factors in the effectiveness of such databases, a number of participants also stressed the importance of information sharing in this respect. Without the exchange of information between national authorities databases of this kind might not contain the data required for them to be effective, however challenges of trust were raised as significant barriers to the sharing of information through databases. Not only might insufficient information-sharing undermine effectiveness but so too, some participants noted, can the sharing of 'irrelevant' information by national authorities. Overall, participants tended to opine that databases were more effective in countering organized crime than terrorism per se.

Perspectives of Operational End Users: Legitimacy of EU Border Control Databases

Law enforcement officers who participated in the focus group on EU border control databases considered legitimacy across the three themes of lawfulness, transparency and rights. Their discussion focused on the legitimacy of border control databases in particular, and not on border control per se. In terms of lawfulness, participants noted that legality is key to legitimacy, but went on to say that 'mere' lawfulness is not sufficient. In addition, some participants raised questions about the implications of the development of SIS II for lawfulness and especially compliance with human rights given the increased sophistication of this database in terms of the data that is entered into it. Participants also

noted that control over and transparency about how databases are used are important from the perspective of lawfulness and legitimacy. Transparency was an important element of the discussion of legitimacy, with some participants noting that more external controls (from the judiciary, NGOs and so on) might enhance transparency and, thus, legitimacy. Participants disagreed as to whether data protection law strikes the right balance between rights protection and law enforcement's need to access data.

Civil Society Perspectives

Civil society focus group participants identified three key elements of impact in respect of border control databases: focus, political agendas and fundamental rights. Some participants felt that in order to measure the impact of border control databases it was necessary to determine the focus of the measurement rather than looking at border control as a whole. Thus, for example, impact might be considered in relation to activities such as the exchange of data or how it is used in this context. Some participants noted that instead of looking at particular measures, impact could be considered by looking at the different aims of border control as a general matter. Participants also suggested that impact could be measured by reference to privacy. The participants stressed that when considering impact attention ought to be given to whether the databases are being used for functions beyond their original rationale, which might be positive or negative from an impact perspective. Interestingly, civil society participants generally felt that effectiveness is of limited relevance in the context of border control: it was felt that such measures would continue to be applied whether effective or not, largely for political reasons. Civil society focus group participants considered the procedure used to change databases and expressed concern about the legitimacy and impact implications of such apparently 'technical' amendments.

Policy-Maker Perspectives

Of the ten policy-makers and high-level operational actors in European institutions interviewed for SECILE, a small number directly

addressed the Schengen Information System (SIS) in relation to its policy implications, particularly ameliorating risks arising from the Schengen travel area and providing a supplementary tool to domestic systems. Interviewees noted that the SIS is not perceived as a counter-terrorist measure.

One interviewee noted that it is relatively easy to determine the effectiveness of the SIS due to the practical structure of the system but a number of policy-makers and operational actors felt the discretionary nature of entering information in the system raised questions of effectiveness.

6.3 Counter-Terrorist Financing

Perspectives of Operational End Users: Impact of Counter-Terrorist Finance Law and Policy

The views of counter-terrorist finance operatives who participated in SECILE in respect of counter-terrorist finance law and policy are presented in full in Counter-Terrorist Finance Operatives' Perspectives on Impact, Legitimacy and Effectiveness of EU Counter-Terrorist Finance Law and Policy.³³ Counter-terrorist finance operatives who participated in the focus group on counter-terrorist finance law and policy noted the difficulty in determining the impact of counter-terrorist finance law and policy given the absence of a means to measure the risk of terrorist financing and the complexity of the system. Participants felt that counter-terrorism measures in this area were more likely to serve a disruptive function rather than ending terrorism per se. The participants were aware of the obligations on the financial service sector and acknowledged the need for a co-operative relationship between the state and financial service sector in order for such measures to be successful. A key consideration for participants was the extent of the US role in European policy.

Perspectives of Operational End Users: Effectiveness of Counter-Terrorist Finance Law and Policy

Counter-terrorist finance operatives who participated in the focus group on counter-terrorist finance law and policy felt that merging anti-money laundering and counter-terrorist finance policy might hinder the effectiveness of such a policy in countering terrorism. Financial Intelligence

Units played a role in the participants' understanding of counter-terrorist finance law and policy and participants considered whether they are to be best understood as a financial intelligence service. Some participants noted the role of asset-freezing sanctions and the challenges of effectiveness, particularly in relation to a lack of political agreement as to which organisations should be blacklisted and the use of litigation to oppose such decisions. Participants disagreed on the question of whether measures should aim for prosecution or prevention.

Perspectives of Operational End Users: Legitimacy of Counter-Terrorist Finance Law and Policy

Counter-terrorist finance operatives who participated in the focus group on counter-terrorist finance law and policy generally agreed the disruption of the financing of terrorism was legitimate because it has a 'democratic basis' in EU treaties and in the need for the free movement of citizens. Legitimacy for many participants was linked to the achievement of a measure's goal, i.e. based on the measure's ability to prevent the financing of terrorism. Participants considered a number of themes in relation to assessing legitimacy, particularly the formal legitimacy of EU treaties, the need for transparency and outcome legitimacy.

Civil Society Perspectives

Participants in the civil society focus group characterised the effectiveness of counter-terrorist finance law and policy as an indicator of a positive impact but participants also identified the negative impact of such systems on NGOs and their ability

³³ Cian C. Murphy, Aldo Zammit Borda & Lucy Hoyte, *Counter-Terrorist Finance Operatives Perspectives on Impact, Legitimacy and Effectiveness of EU Counter-Terrorist Finance Law and Policy* (SECILE Consortium, 2014) <http://secile.eu/operational-perspectives-eu-counter-terrorism-action/>

to do their work due to financial regulations emanating from this system. The dangers of discrimination in the application of the system for disruption of terrorist financing were explored and one participant noted the need to rely on 'hard intelligence' only in subjecting people to such measures. Civil society focus group participants viewed the effectiveness of counter-terrorist finance law and policy as relating to whether the measures perform their intended function, although participants regarded this as being extremely difficult to establish. Civil society focus group participants considered legitimacy to be closely connected with proportionality and the degree 'democratic control' over the measure. The motivation for introducing the measures was also

considered important in relation to effectiveness by the focus group participants.

Policy-Maker Perspectives

Of the ten policy-makers and high-level operational actors in European institutions interviewed for SECILE, a small number made reference to the EU's counter-terrorist financial disruption system in relation to the implications of listing from a criminal law perspective and the policy implications of allowing a suspected terrorist to be represented in the listing decision. One interviewee noted the complicated nature of investigations relating to terrorist financing.

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte

Law Enforcement Officers' Perspectives on Impact, Legitimacy and Effectiveness of EU Border Control Databases

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte

Counter-Terrorism Finance Operatives' Perspectives on Impact, Legitimacy and Effectiveness of EU Counter-Terrorism Finance Law and Policy

Cian C. Murphy, Aldo Zammit Borda, Luca Hoyte

Prosecutors' and Government Officials' Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant

Rozemarijn Van der Hilst

Civil Society Perspective on the Impact, Legitimacy and Effectiveness of European Counter Terrorism Measures

Fiona de Londras & Josephine Doody

Policy-Maker Perspective on Impact, Legitimacy and Effectiveness in EU Counter-Terrorism

7. Insights from Policy-Makers

As part of SECILE, ten semi-structured interviews were undertaken with key policy makers across the EU institutions whose involvement in a focus group would have been inappropriate. These

participants are referred to in the following sections by participant numbers P1-P10. The key insights from these interviews are as follows.

7.1 Impact

The policy-makers emphasised the importance of understanding the referent when assessing impact. In this respect, a number of interviewees approached impact from the perspective of the individual. This entailed a consideration of the impact of counter-terrorist measures on the enjoyment of individual human rights. There was a recognition that individuals do not exist in a vacuum but rather come together to form communities and societies and, thus, that impact can be approached from this broader societal level. Considering impact at the societal level entails exploring how counter-terrorist measures affect our democratic values, practices and principles. In addition to this, interviewees considered impact across five categories: economic impact, operational/practical impact, impact on level of security, impact on operational actors, and political/diplomatic impact. All participants noted

that one challenge of understanding and predicting impact is that some impacts are quantifiable and 'measurable' (for example economic impacts) while others are more qualitative and thus more difficult to assess and take account of. The assessment of impact can take place both *ex ante* and *ex post facto*. While the *ex ante* assessment is intended to give a rigorous evidence base for political decisions as to which counter-terrorist measures to introduce, *ex post facto* assessments ideally have an evaluative function. Some interviewees raised concerns about the utility of considering impact in a pan-European way as impact will vary depending on one's starting point: on the existing legal framework, history and experience of each member state.. A further concern about understanding impact that was raised related to poor communication within the policy-making process, which, it was said, might lead to a disconnect between the levels of strategy and operation, European and national.

7.2 Legitimacy

Interviewees identified three core components of legitimacy: legality, process and something that extends beyond the law into the area of morals and ethics. Firstly, legality (i.e. compatibility with primary and secondary law) was identified as a *sine qua non* of legitimacy. In this respect the concept of proportionality as a mechanism of considering lawfulness was raised on a number of occasions: a number of interviewees expressed the view that disproportionate measures would suffer from a legitimacy deficit. In respect of process, interviewees opined that how a law was adopted, who by, and under which processes were significant considerations. In this respect, attention was drawn to participation, deliberation, contestation,

reviewability, and learnability in the development, implementation and review phases. In terms of development, interviewees considered necessity, proportionality and fairness to be related to legitimacy, while levels of domestic implementation were considered to be indicators of perceived legitimacy. Some participants raised questions of legitimacy in respect of very technical implementation and development modalities, which may not be exposed to the same public debate or rigour as the broader political policy being pursued. Some interviewees also identified the output of deploying a particular measure (e.g. a successful prosecution following use of a European Arrest Warrant) as an indicator of legitimacy.

Going beyond legality and due process, there is a question of legitimacy in terms of moral and ethical considerations, in relation to which a number of interviewees discussed the tension that can exist between transparency and secrecy. Assessing where the balance between these values might lie was considered to have legitimacy implications. This reflects the fact that interviewees identified accountability, transparency, participation and democracy as core values that are implicated in a discussion of legitimacy, although they acknowledged that particular challenges might arise in the context of security. In this respect, things like classification of documents in the EU, the role of courts, and the role of independent review were raised as ways of potentially addressing such challenges.

A key question that arose in the interviews related to how legitimacy can be measured. It was generally felt that legitimacy can be measured in

a legal sense by reference to the concepts of necessity and proportionality. In this respect, courts may ultimately make the decision as to actual legitimacy considered from a legal perspective. In addition to legal assessments, interviewees noted that there are a number of important stages involved in ensuring the legitimacy of a legislative measure including proposal, consultation with a wide range of stakeholders and impact assessment. Furthermore, as legitimacy was generally considered to be 'legality +', understanding each of these layers as being part of the process of ensuring legitimacy was seen as being important. What came across clearly in the interviews, however, is that regardless of the process, ultimately what determines the outcome of any process relating to counter-terrorism is political will: in the absence of a definitive legal decision as to 'legitimacy' (i.e. a court case), political judgement determines proportionality, necessity and ultimately legitimacy.

7.3 Effectiveness

Objectives and purpose played a central role in the interviewees' conceptualisation of effectiveness, with interviewees generally equating 'achievement of objectives' with effectiveness. However, some interviewees recognised that objectives may shift and that a measure might not achieve its original objective but prove to be quite useful in achieving another. In this context it was considered that a measure might still be considered effective when considered against 'broader' security-oriented and counter-terrorist objectives, although this may have implications for its legitimacy. Interviewees agreed that linking effectiveness with objective and purpose may be a simplified way of approaching the concept and that understanding effectiveness might be complicated by including other issues in the consideration, such as weaknesses in the policy-making process, a deeper excavation of the actual purpose of the measure in question, and the possibility of unanticipated consequences.

Interviewees agreed that assessing the effectiveness of a counter-terrorism measure can

be challenging as, in some cases at least, effectiveness may be indicated by a lack of terrorist incidents, which may also be explicable by a range of other factors. In such circumstances, interviewees considered that it might be helpful to consider other components of effectiveness and to differentiate between perspectives (legal, operational, etc). From a legal perspective we might consider effectiveness by reference to the comprehensiveness of the governing legal framework relating to terrorism and counter-terrorism and the role that a particular measure plays within that system. Effectiveness within the operational framework might be considered by reference to the ease and speed with which a measure can be deployed in practice. From a societal perspective we might consider the effectiveness of a measure in terms of the wider impact that it has on society and on particular communities within society. Making wider societal links alerts us to the possibility that a measure might be effective in one way, but disruptive or harmful in others. Added to this complexity is the fact that effectiveness may change over time. As one measure is effective, terrorists may innovate and identify new routes, opportunities and means.

The effectiveness of counter-terrorism measures thus requires constant re-evaluation.

From a law enforcement perspective, statistics might be used to assess effectiveness. However, interviewees raised a number of concerns in relation to the use of statistics alone to indicate effectiveness, most particularly the manipulability

of statistics, the limited nature of statistics, and the impossibility of capturing some disruptive successes in statistical form. One interviewee suggested that the most appropriate approach might be to instigate broader process of evaluation including but going beyond statistical and quantitative enquiry.

Fiona de Londras & Josephine Doody

Policy-Maker Perspectives on Impact, Legitimacy and Effectiveness in EU Counter-Terrorism

8. Impact, Legitimacy and Effectiveness: Conclusions

8.1 Understanding Impact

Bringing together all of the research undertaken within SECILE, a number of key observations about understanding and measuring impact within the context of EU counter-terrorism can be drawn out.

First, impact can only be understood in relation to a referent: who or what does the measure have an impact on? In order to have a comprehensive analysis of the predicted or actual impact of a measure, a range of referents is required. These include (i) societal groups, (ii) operational actors in the counter-terrorist field, (iii) national and transnational economies, (iv) politics including international diplomacy, (v) law and legal systems (including legal procedure), (vi) overall security, and (vii) the security concern that the measure is designed to address. In respect of each of these referents consideration should be given to direct, indirect, national, transnational, positive and negative impacts.

Impact analysis takes place at different stages of the lifecycle of a measure, and it may not always be appropriate to apply the same analytical approaches at the ex ante stage as at the ex post

facto stage. Furthermore, it may be appropriate to consult a more diverse set of stakeholders when assessing actual impact than was the case when assessing predicted impact. At the ex ante stage it may be that certain experts and independent office holders are consulted as proxies for societal groups and interests, for example, that might then be capable of participating in a retrospective impact analysis, thus ensuring a diverse range of views and perspectives. In addition, impact assessment ought to be undertaken with a critical appreciation of the strategic viewpoints and interests at play, including political and industry interests.

In the context of counter-terrorism in the EU, concerns are raised in the research about the processes of impact assessment in respect, specifically, of (a) the ex ante impact assessment which appears at times to over privilege economic and operational perspectives over societal and rights-related ones; (b) the lack of systematic ex post facto review and evaluation to consider the 'real' impact of measures; (c) the somewhat limited nature of 'legal' analyses of impact when broader societal, political and security concerns are taken into account.

8.2 Understanding Legitimacy

Bringing together all of the research undertaken within SECILE, a number of key observations about understanding and measuring legitimacy within the context of EU counter-terrorism can be drawn out.

First, legitimacy can be understood across a number of different dimensions relating to process, content and practice. A comprehensive legitimacy analysis would take all of these elements into account, spanning the processes of making, applying and reviewing counter-terrorism. Furthermore, any such legitimacy analysis would recognise that output and outcome are not synonymous in EU counter-terrorism, i.e. that the 'effectiveness' of a measure

(considered further below) is not a proxy for the legitimacy of the output of a process (i.e. the measure itself).

In respect of making counter-terrorism law and policy, participation (including consultation) and accountability were identified as key elements of legitimacy. In this respect, participation involves not only the potential for affected stakeholders and communities to engage with practices of law- and policy-making directly, but also their proxy participation through the involvement of democratic representatives such as members of the European Parliament. Serious concerns about the marginalisation of the Parliament before the implementation of the Lisbon Treaty emerged in the

research. Furthermore, concerns about information sharing in order to ensure meaningful participation and accountability were raised. Some particular legitimacy concerns arose in respect of highly technical stages of the development or implementation of policy, which might not be subjected to same levels of scrutiny or oversight as earlier, more policy-level stages in development, although this concern was not shared equally across research participants.

The research identified a lack of systematic review of the operation of EU counter-terrorism measures, which raised concerns as to legitimacy. This relates to the fact that legitimacy may be temporally contingent, reflecting the fact that a measure might be considered to be necessary and proportionate at one time but, as circumstances change, either the negative impact of the measure might be greater than anticipated thus suggesting disproportionality, or the broader context may change in a manner that

otherwise calls the appropriateness of the measure into question. Furthermore, measures designed to address one security concern may be applied in other contexts, without an appropriate assessment of impact and effect having been undertaken *ex ante*. The lack of systematic processes of review to identify any such adjustments or trends calls the legitimacy of these measures' continuing application into question.

At all levels of assessing legitimacy a tension between transparency and security may arise, relating to classified documents, information and intelligence held by national authorities alone, and political concerns. Enhancing the legitimacy of EU counter-terrorism requires the design and implementation of mechanisms of managing these tensions in line with the principles of participation and accountability (including parliamentary oversight at European and, arguably, national level of the implementation of EU counter-terrorism measures).

8.3 Understanding Effectiveness

Bringing together all of the research undertaken within SECILE, a number of key observations about understanding and measuring effectiveness within the context of EU counter-terrorism can be drawn out.

At its most basic, effectiveness can be understood in terms of the extent to which objectives for the measures in question have been achieved. In the context of counter-terrorism this simple conceptualisation is complicated by three factors: (i) the fact that discrete measures are part of a broader system of counter-terrorism and may have both meta objectives (relating to security generally) and specific objectives (relating to the measure in particular), (ii) the fact that the meta- and specific objectives of a measure may not be clearly identified, and (iii) the possibility of measures designed for one purpose being applied to other issues or having unanticipated impacts in relation to other areas. Furthermore, the perceived effectiveness of a measure is likely to bear some relationship to the perspective, priorities and broader purposes or aims of the person or entity making the assessment.

Given the temporally contingent nature of much of counter-terrorism, bearing in mind shifting threats, opportunities and (geo) political realities, effectiveness ought to be reviewed and assessed on a relatively regular basis. In this respect, the limitations of a purely statistical or quantitative evaluation need to be borne in mind: statistics are neither exhaustive indicators of effectiveness nor necessarily objective. Furthermore, while a measure might be effective in one sense (for example by disrupting apparent routes of terrorist financing), it might be ineffective in others (for example by introducing inefficiencies in financial governance, incentivising adaptation and innovation by terrorist organisations, undermining social cohesion, or undermining fundamental rights).

The research undertaken within SECILE suggests that regular, systematic and evaluative assessments of the effectiveness of EU counter-terrorism are frequently lacking suggesting, as a result, that there is insufficient understanding of the extent to which the many and diverse measures introduced since 2001 achieve the meta-objective of a more secure Europe when considered in concert, or the specific objectives for which they were introduced.

9. Proposals for reform

Based on the insights gleaned from the research in SECILE the following reforms for the better understanding, measurement and analysis of the impact, legitimacy and effectiveness of EU counter-terrorism are made.

PROPOSAL 1: Enhance the Assessment of Rights-Related Impact

The practice of the EU institutions at present suggests that while societal impact, including rights-related impact, is recognised as part of the impact assessment both *ex ante* and *ex post facto*, it is under-analysed and the process by which an assessment of the proportionality of proposed measures is reached is unclear. While it is extremely difficult to predict rights-related impact with certainty in advance of introducing a measure, more attention should be given to the views and estimations of specialist actors with responsibility for rights assessments such as the EUDPS and FRA in preparing *ex ante* impact assessments. Where there is an *ex post facto* assessment the practical operation of the measure, assessed from a number of different perspectives (including those of affected communities), should be taken into account in order to revisit, enrich and complicate the necessarily speculative *ex ante* assessment.

This relates to the importance of ensuring appropriate participation in impact assessment. It is acknowledged that, in preparing *ex ante* impact assessments, the European Commission does involve a range of stakeholders, including civil society actors. In addition, when proposals are being considered in the European Parliament and its committees, external stakeholders such as community groups, NGOs and academics may be called upon to participate. In this respect it is essential that any *ex post facto* review in particular would be designed in a manner that first reviews whether the original stakeholders ought to be invited to contribute again and, furthermore,

whether practice relating to the measure in question suggests that a broader consultation ought to be engaged with (either by invitation or public consultation or both).

Participation is widely recognised as a key legitimacy-indicator, however the particular nature of counter-terrorist decision-making is such that maximum participation may not be appropriate or possible. This relates to transparency concerns considered below. However, even bearing this in mind, a greater degree of meaningful consultation with key stakeholders is likely to increase the perceived legitimacy of EU counter-terrorism. In this respect, key stakeholders must extend beyond industry and security experts but also include civil society and specialist agencies with rights-related interests, although participation need not necessarily be the same at different levels of the decision-making process.

PROPOSAL 2: Enhance Democratic Oversight

A number of concerns about democratic oversight of EU counter-terrorism arose in the research and, while changes introduced by the Lisbon Treaty will enhance parliamentary engagement with counter-terrorism, the European Parliament ought to be empowered to engage in more effective and closer oversight in this field. This is especially so as a large amount of EU counter-terrorism takes place by means of non-legally-binding measures and initiatives in relation to which greater and more meaningful participation would be welcomed in line with the EU's general commitment to openness in decision-making. In addition, the oversight capacity of the European Parliament would be enhanced through the establishment of a security cleared committee to engage with national and European authorities in respect of security-sensitive and classified information, where such a committee would work in accordance with international standards for

intelligence and security oversight as well as for the classification of information.

PROPOSAL 3: Enhance Transparency

In order to achieve greater democratic accountability, steps ought to be taken to ensure greater transparency while bearing in mind the genuine concerns that exist in relation to security and secrecy. Transparency about processes of policy-making, political decision-making, the extent and cost of EU counter-terrorism, its practical operation, and its implications for individual and societal rights and values is central to enhancing the legitimacy of the EU's counter-terrorism. However, transparency cannot be pursued to the extent that security-sensitive information becomes publically available thus jeopardising collective security. Thus, approaches to transparency ought to be both innovative and appropriate.

As well as reforming the system of classification within the EU, consideration ought to be given to means of enhancing the transparency of policy-making in EU counter-terrorism. Although some elements of the decision-making process in EU counter-terrorism may need to remain largely undisclosed to the general public, in both these and other fields a layered approach to transparency might be devised that enhances legitimacy. First, general policy-making ought to be participatory and subject to as open a method of decision-making as possible. Second, decisions as to the degree of publicity that can safely be attributed to a particular process of devising a measure, protocol, legislative proposal etc ought to be made by reference to objective criteria relating to security risks associated with disclosure. Third, where a closed process is appropriate and required by reference to objectively assessed security concerns, alternative mechanisms of ensuring participation and transparency (such as briefing security-cleared committees of the European Parliament) ought to be embraced. Fourth, highly technical and technocratic stages of development should be preceded by a general policy-making process that embraces the principle

of transparency. In all cases, and especially where publicity has been limited, a transparent process of ex post facto review ought to be engaged in, albeit subject to any necessary security limitations in terms of the kinds and amounts of information disclosed to the general public

PROPOSAL 4: 'Close the Loop' by Systematising Review

Ensuring systematic and evaluative review of the operation, making and impact of counter-terrorism is key to understanding its impact, enhancing its legitimacy, and assessing its effectiveness. Thus, it is vital that the European Union would 'close the loop' by ensuring review of EU counter-terrorism. This necessitates compliance with review clauses that are already contained in many such measures, but also the instigation of systematic review across the EU in respect of the impact and effectiveness of these measures. This might be undertaken through the establishment of an independent reviewer of EU counter-terrorism, or by means of review by committees of the European Parliament with appropriate levels of clearance (where appropriate), by enhanced engagement by national oversight authorities with EU-level reviews, for example. In addition, it is essential that there would be a full, systematic albeit one-off review of EU counter-terrorism as called for by the European Parliament in 2011 in order to assess the current state of EU counter-terrorism as applied within and across the member states of the European Union.

Any review of EU counter-terrorism ought to critically assess both the impact and effectiveness of these measures in order to enhance the legitimacy of their continuing operation. If necessity and proportionality are key elements of legitimacy, and if legitimacy can be temporally bounded inasmuch as changing socio-political conditions may result in adjustments in necessity and proportionality analyses, then rigorous review of the operation of these measures is required. Such a review would, furthermore, allow for a factual assessment of impact to be undertaken so

that a more concrete and less speculative proportionality analysis can be undertaken than is possible at the *ex ante* stage.

In order to be meaningful, such reviews ought to be regular, participatory, public (to the extent

possible and bearing in mind the challenges of transparency in the security context considered in relation to legitimacy), and capable of bringing about policy, legal, practical and political reorientation by providing a rigorous evidence base for policy (re)evaluation.

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