

SECILE

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

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

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SECILE: Securing Europe through Counter-Terrorism – Impact, Legitimacy & Effectiveness

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ABSTRACT

SECILE is an EU-funded research project examining the legitimacy and effectiveness of European Union counter-terrorism measures (CTMs). This report examines the mechanisms available to the EU to assess the impact, legitimacy and effectiveness of its counter-terrorism policies. The research focuses primarily but not exclusively on the utilisation and application of these mechanisms rather than the substance of the assessments that they produce. The report forms the basis for further research and analysis regarding the legitimacy and effectiveness of EU CTMs by the SECILE consortium. The report was produced by the civil liberties organisation *Statewatch* which is conducting a 'stocktake' of EU CTMs and collecting and analysing data about their development and implementation (SECILE work package 2). Readers of this report should also refer to deliverables D2.1 (a catalogue of CTMs adopted by the EU since 9/11), D2.2 (a report on the national transposition of EU CTMs) and D2.4 (a case study on the implementation and review of the EU "Data Retention" Directive).

TABLE OF CONTENTS

1. Introduction	4
2. Methodology and scope	5
3. EU mechanisms to assess impact, legitimacy and effectiveness	6
3.1 <i>Ex-ante</i> assessment procedures	6
3.1.1 Background: “opening up the policy-making process”	6
3.1.2 Public consultation on counter-terrorism measures	7
3.1.3 Use of impact assessments	10
3.2 The decision-making process	13
3.2.1 Involvement of the European Parliament	13
3.2.2 Involvement of advisory bodies	15
3.3. <i>Ex-post</i> assessment procedures	17
3.4 Substantive reviews of EU counter-terrorism policy	21
3.4.1 The peer-review mechanism	21
3.4.2 The Network of Independent Experts on Fundamental Rights	23
3.4.3 The EU Counter-Terrorism Coordinator	25
3.4.4 The 2010 review of EU counter-terrorism policy	25
3.5 Conclusions	28
4. Overview of use of assessment mechanisms for EU CTMs	30
4.1 Agreements	30
4.2 Common Positions	32
4.3 Decisions	33
4.4 Directives	39
4.5 Framework Decisions	43
4.6 Joint Actions	46
4.7 Regulations	47
5. Court cases	53
5.1 Agreements	53
5.2 Common Positions	53
5.3 Directives	54
5.4 Framework Decisions	56
5.5 Regulations	57

1. Introduction

In its Catalogue of EU counter-terrorist measures (CTMs) adopted since 11 September 2001 (see SECILE deliverable D2.1) *Statewatch* has attempted to compile all relevant EU counter-terrorism measures adopted since 11 September 2001. This suggests that at least 239 specific EU laws and policy documents have been adopted in the name of “counter-terrorism” since 11 September 2001, 88 of which are legally binding (or “hard law”). This report considers questions at the heart of the SECILE project: whether and how EU institutions have assessed the impact, legitimacy and effectiveness of those measures. This is done by examining the extent to which a range of consultative, legislative and review procedures at the EU’s disposal have been applied in practice to the 88 legally binding measures.

The report suggests that applied in full to the EU law and policy-making process, these procedures have the *potential* to provide for a competent if not comprehensive evaluation of the impact, legitimacy and effectiveness of all EU legislation, from conception through to design, adoption and implementation. It is, however, well beyond the scope of this report to evaluate how the EU has reviewed the legitimacy, impact and effectiveness of each of the 88 legally binding counter-terrorism measures. Instead the report has two less ambitious objectives. First, to describe the various mechanisms that might allow the EU institutions to attempt to assess the desirability and efficacy of its counter-terrorism policies, and second, to provide quantitative data about the extent to which the EU has actually sought to do this in practice. Concomitant to these two tasks, the report endeavours to suggest where further research into the EU’s policy and practice of legitimacy and effectiveness assessment might be undertaken by the SECILE project and others in civil society concerned by these questions.

2. Methodology and scope

Statewatch has been monitoring the development of EU Justice and Home Affairs policy since the organisation was founded in 1990. In 1997 *Statewatch* launched the European Monitoring and Documentation Centre on EU Justice and Home Affairs Policy (SEMDOC). The SEMDOC website documents every single EU measure adopted in the area of justice and home affairs (JHA) since the entry into force of the Maastricht Treaty on European Union in 1993. The SEMDOC archives include more than 10,000 documents concerning JHA and security policy dating back to the mid 1970's, when European Economic Community (EEC) states commenced *ad hoc* cooperation on Terrorism, Radicalism and Violence (the 'TREVİ' framework). After the terrorist attacks of 11th September 2011 *Statewatch* began tracking the development of the EU counter-terrorism agenda, reporting on new proposals and providing full-text documentation and analysis of key measures.

This report provides information about the mechanisms used by the EU to evaluate the impact, legitimacy and effectiveness of EU counter-terrorism measures in the member states. For the purposes of this study an EU legal act or policy document is considered to be an EU counter-terrorism measure if (i) it has at some point in time been part of the EU's counter-terrorism agenda; (ii) it has been adopted or approved by an EU institution or body or otherwise represents the official policy of the European Union.

EU laws are usually categorised according to their legal effect as "binding" (or "hard" law) or "non-binding" ("soft" law). This report focuses on the 88 hard law measures identified in a catalogue of EU CTMs (see SECILE Deliverable 2.1). The current EU ('Lisbon') treaty framework provides for three different types of legally binding legislative act: Regulations, Directives and Decisions (under Article 288 TFEU). In addition, the previous EU ('Amsterdam') treaty provided for additional types of legislative act in the field of JHA policy (under Title VI TEU): Conventions, Framework Decisions, Decisions and Common Positions. Still more measures – common strategies, Common Positions and Joint Actions – are used to implement the EU Common Foreign and Security Policy. There are also various types of legally binding EU agreements with third states or bodies.

There are various assessment measures available to the EU institutions. These are defined in the report as pre-legislative or *ex-ante* assessments (see section 3.1), assessments in the form of reports or opinions produced during the decision-making process (section 3.2), and post-legislative or *ex-post* assessments (section 3.3). We also identify and discuss a fourth category of "substantive reviews" focusing on thematic areas of EU counter-terrorism policy including those conducted by the EU member states (the "peer review" mechanism) and EU bodies such as the now defunct EU Network of Experts on Fundamental Rights, the EU Counter-Terrorism Coordinator and the European Parliament's Civil Liberties Committee. All of this research was based on material retrieved from the SEMDOC archives and official sources of EU documentation (the Official Journal, institutional websites, public registers of Council, Commission and European Parliament documents etc.).

It should also be noted that some of the most important evaluations of the impact, legitimacy and effectiveness of EU counter-terrorism legislation have come from the European Court of Justice. Of the 88 binding EU CTMs we have identified, 14 (or 16%) have been the subject of proceedings before the European Court of Justice. These proceedings take two forms: cases challenging the legality of the actions of the EU institutions in respect to the adoption or application of these laws, and referrals from national courts requesting "preliminary rulings" from the ECJ on the interpretation and substance of these laws. While an analysis of these cases and the extent to which they have indeed entailed or engendered a substantive review of the impact, legitimacy or effectiveness of these laws is also beyond the scope of this report, a list of the relevant legislation and legal challenges is included in section 5.

Finally, an overview all of the data regarding the utilisation of the various pre- and post-legislative assessment mechanisms described above is included in section 4.

3. EU mechanisms to assess impact, legitimacy and effectiveness

3.1 Ex-ante assessment procedures

3.1.1 Background: “opening up the policy-making process”

The stated desire on the part of the European Union institutions to better involve the public in its policy-making procedures is intimately linked to public disquiet about the EU itself. This disquiet has manifested itself in (largely) academic debates about democratic legitimacy (typically centred on a perceived “democratic deficit”), public protests at EU summits, the recent rejection of the EU Constitution by voters in several EU member states and the apparent unpopularity of the EU as routinely measured in public attitude surveys.

Thus it was against the backdrop of violent protests (and no less violent policing) at the EU summit in Gothenburg and the G8 summit in Genoa in the summer of 2001 that the European Commission published “European Governance – A White Paper”.¹ Its purpose was to “get citizens more actively involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest”. This would be achieved by “opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy” in order to promote “greater openness, accountability, and responsibility for all those involved.” The Commission followed up its governance white paper in 2002 with two further Communications: “European Governance: Better lawmaking”² and “Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission”.³ The second of these promised a “Commission-wide approach” on how to undertake consultation and declared that “the process should be more consistent”. All of this was intended to serve “a dual purpose... helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties at large.”⁴ This meant “consulting as widely as possible” albeit only in relation to “major policy initiatives”.⁵

After the rejection of the draft EU constitution by French and Dutch voters in referenda in May 2005, the European Commission marked the start of a 12 month “period of reflection” with an “Action Plan to improve communicating Europe”.⁶ As in the wake of the Genoa and Gothenburg demonstrations of 2001, the institutions were determined to “reconnect” with the disillusioned EU masses, suggesting that “Europe’s citizens want to make their voices in Europe heard” and promising that “their democratic participation should have a direct bearing on EU policy formulation and output”. Following the summer recess, in October 2005, the Commission produced another Communication entitled “Plan D for Democracy, Dialogue and Debate”.⁷ This proposed various measures to “stimulate wider public debate” including visits by Commissioners to member states, “open doors” at Commission representations, a “European Round Table for Democracy”, EU “Goodwill Ambassadors” and support for European citizens’ projects (which would later become the European Citizens Initiative).⁸ Upon completion of the “period of reflection”, the Commission produced two further Communications including “A Citizens’ Agenda delivering results for Europe”.⁹ Under the heading “Freedom, Security and Justice” the Commission promised to “focus

¹ COM(2001) 428 final, 25 July 2001, http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf

² COM(2002) 275 final, 5 June 2002, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF>

³ COM(2002) 704 final, 11 December 2002, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>

⁴ COM(2002) 704 final, 11 December 2002, p.5

⁵ COM(2002) 704 final, 11 December 2002, p.15

⁶ SEC(2005) 985 final, 20 July 2005, http://ec.europa.eu/dgs/communication/pdf/comm-initiatives/action-plan2005_en.pdf

⁷ (COM (2005) 494, 13 October 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0494:FIN:EN:PDF>

⁸ European Commission, ‘The European Citizens’ Initiative’, <http://ec.europa.eu/citizens-initiative/public/welcome>

⁹ ‘the Period of reflection and Plan D’, COM (2006) 212, 10 May 2006, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0212en01.pdf; ‘A Citizens’ Agenda delivering results for Europe’, COM (2006) 211, 10 May 2006, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0211en01.pdf

on respect and promotion of fundamental rights for all people”, but apart from that it would be more of the same as far as the EU policy agenda was concerned: a stronger anti-terrorism policy, enhanced cooperation between law enforcement and judicial authorities, tighter external border controls, and so on.

And so it was that the Treaty of Lisbon promised both deeper integration and more democratic governance through ‘democratic equality’ (the European institutions must give equal attention to all citizens), ‘representative democracy’ (a greater role for the European Parliament and greater involvement for national parliaments) and ‘participatory democracy’ (new forms of interaction between citizens and the European institutions).¹⁰ Despite these advances, the rather circular debates about the legitimacy and necessity of the EU have again come to the fore in the run-up to the European parliamentary elections in 2014, with officials from the Parliament concerned that: “The current economic and financial crisis together with high rates of unemployment, particularly among young people, is resulting in diminished trust in European institutions by citizens... it is evident that the EU’s image is suffering... In order to reverse the perception that ‘Europe is the problem’, we need to communicate that the answer to existing challenges... is ‘more Europe’ not ‘less Europe’.”¹¹ At the very least, these recurrent attempts to demonstrate the legitimacy and effectiveness of the EU to the public suggest that previous initiatives may have failed to achieve their underlying goals.

3.1.2 Public consultation on counter-terrorism measures

Despite the decade-old commitment on the part of the European Commission to consult the public more widely, the number of public consultations held in relation to the 88 binding counter-terrorism measures adopted since 2001 is incredibly low. As demonstrated in Figure 1, only three public consultations have been undertaken, equating to a rate of just 3.4%. These initiatives concerned the retention of telecommunications traffic data for law enforcement purposes (see further SECILE deliverable 2.4),¹² the establishment of the Visa Information System,¹³ and the EU framework for critical infrastructure protection.¹⁴

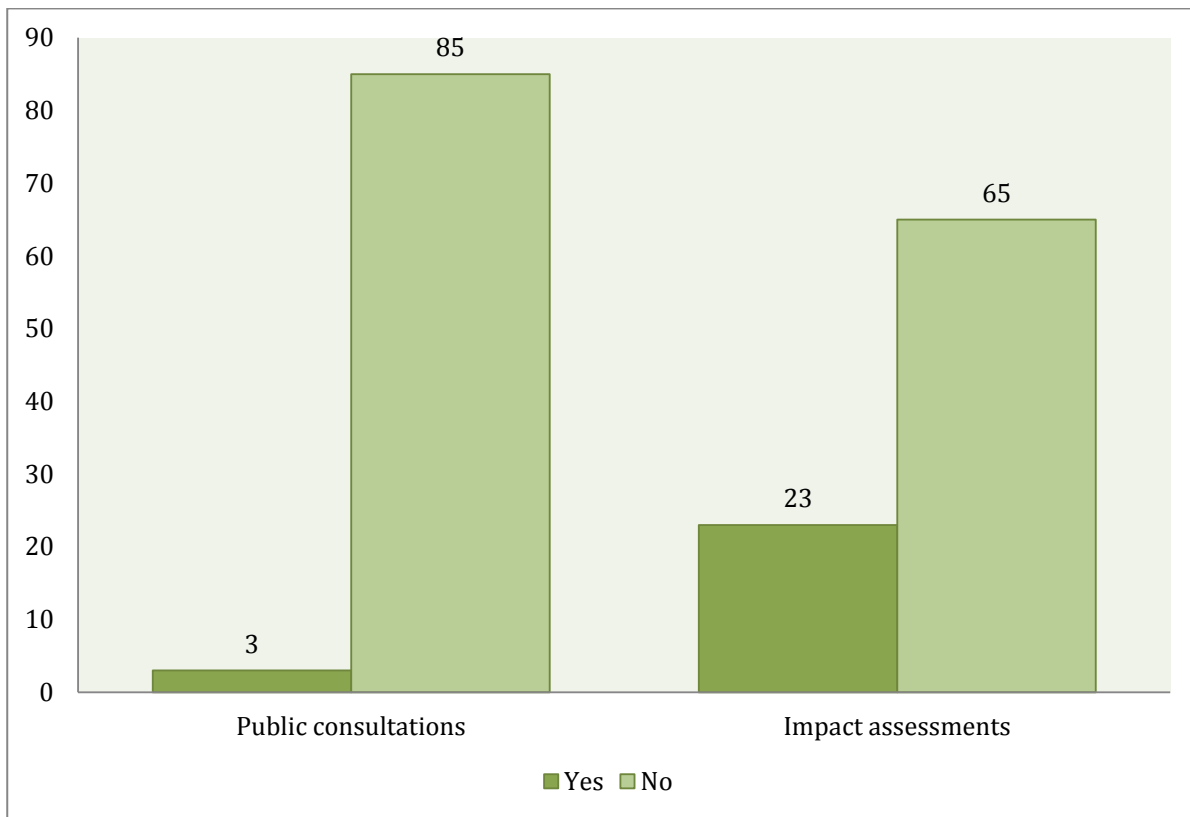
¹⁰ Article 8, Treaty on the Functioning of the European Union.

¹¹ Bruno Waterfield, ‘EU to set up euro-election ‘troll patrol’ to tackle Eurosceptic surge’, *The Telegraph*, 3 February 2013, <http://www.telegraph.co.uk/news/worldnews/europe/eu/9845442/EU-to-set-up-euro-election-troll-patrol-to-tackle-Eurosceptic-surge.html>

¹² DG INFSO-DG JAI consultation document on traffic data retention, 30 July 2004, <http://www.statewatch.org/news/2004/aug/consult-data-retention.pdf>. The Data Retention Directive was also subject of a public consultation on “the evaluation of the application of the Directive”, largely concerned with “the impact of the Directive on economic operators and consumers”: European Commission, ‘Consultation on the Evaluation of the Application of the Directive 2006/24/EC (Data Retention)’, 2009, http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2009/consulting_0008_en.htm

¹³ European Commission, ‘Consultation of Visa Information System (VIS)’, 2004, http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2004/consulting_0018_en.htm

¹⁴ European Commission, ‘Green Paper on a European Programme for Critical Infrastructure Protection’, January 2005-06, http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2006/consulting_0013_en.htm

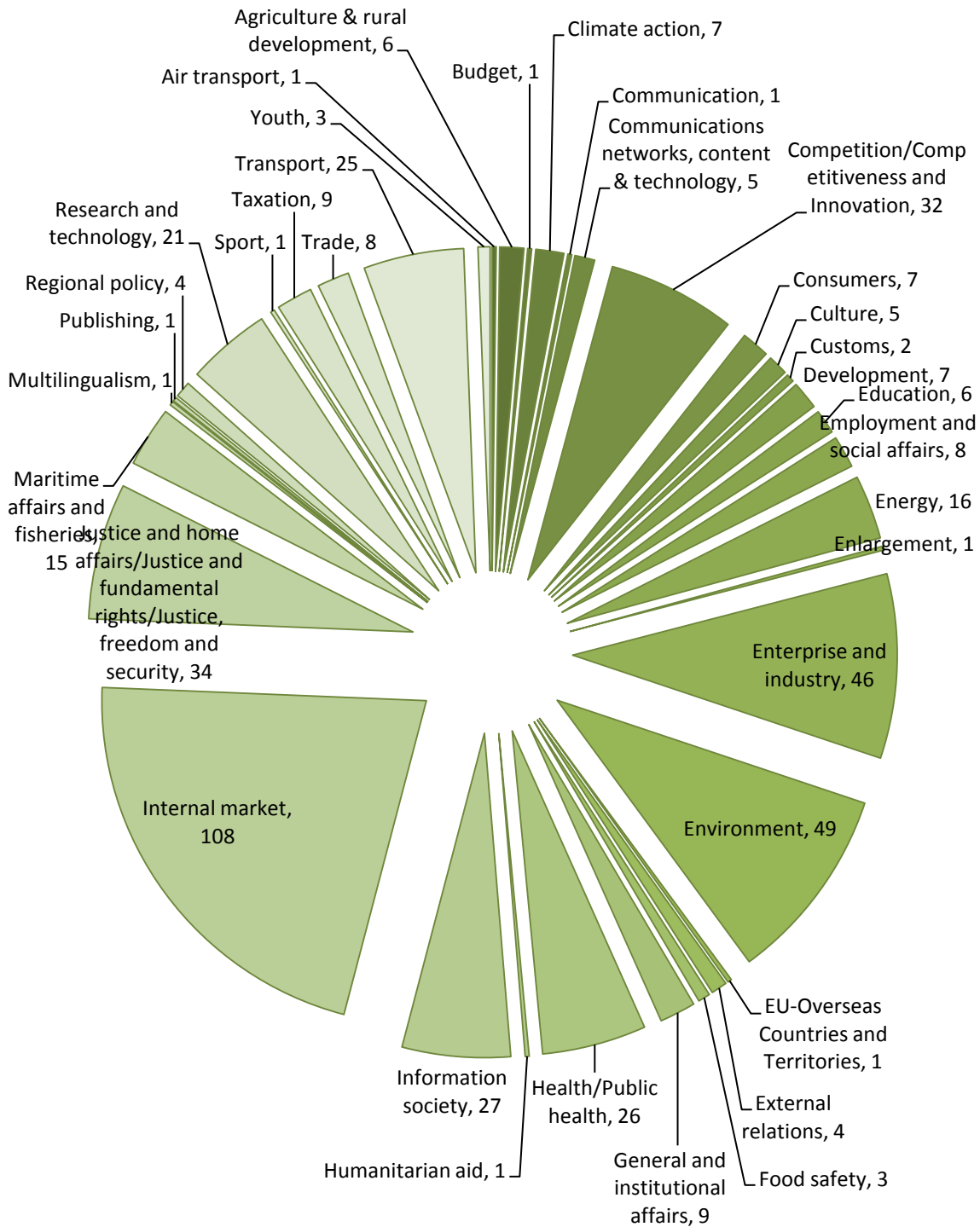
Figure 1: Pre-legislative assessment procedures on counter-terrorism measures

Of the three pre-legislative public consultations, only the one concerned with the Visa Information System (an EU database launched in October 2011 that houses the personal data and fingerprints of all applications for Schengen visas, including unsuccessful applications) demonstrated a clear understanding of impact from a fundamental rights perspective, asking questions such as ‘What are the eventual impacts on illegal immigrants?’; ‘What are the eventual impacts on asylum seekers?’; and ‘Which impacts will the implementation of the VIS have from the data protection point of view?’. The critical infrastructure consultation paper made no mention of fundamental rights issues and although the consultation document on data retention noted that the planned new legislation would amend the “e-Privacy” Directive, which was established “to contribute to the protection of citizens’ fundamental rights and freedoms, and in particular their privacy and personal data”, it failed to canvass opinion as to the desirability of this proposal. Instead, it focused on the feasibility of a common EU data retention regime and technical matters such as “the types of data that should be retained” and for how long etc. It is not unreasonable to conclude, therefore, that in respect to the adoption of 88 legally binding EU counter-terrorism measures, the EU has only sought input from the public in regard to the fundamental rights implications in one single instance, and even then this concerned not EU citizens, but persons from third countries who wished to visit the EU.

If the lack of public consultation is a problem, it appears to be particularly acute in the EU Justice and Home Affairs (JHA) policy field as a whole. Most EU counter-terrorism policy originates from the JHA policy field – which covers issues such as policing, judicial cooperation, criminal law, migration and border control – and in the decade from January 2002 to December 2012, a total of 1,395 texts were adopted by the EU institutions in this area.¹⁵ Yet since June 2002, information published by the Commission suggests there have been just 34 public consultations on JHA policy issues (see Figure 4, below). Of course, not all of the adopted texts were legislative decisions and fewer still can be considered “major initiatives”. And there may be other mitigating factors with

¹⁵ Council of the European Union, ‘List of texts adopted in the JHA area’, <http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-%28jai%29/list-of-texts-adopted-in-the-jha-area?lang=en>

respect to EU counter-terrorism measures, such as the exceptional legislative climate in the immediate aftermath of 9/11, when the Commission would not have been expected by many to delay its proposals with public consultations. The design of the old “Third Pillar” meant that some JHA legislation was proposed by the member states acting in the EU Council rather than the Commission. But the fact remains that no consultations whatsoever were carried out in relation to dozens of legally binding EU counter-terrorism measures with a tremendous impact on policing, criminal law and procedure, migration policy, border control and fundamental rights.

Figure 2: Number of public consultations by policy area¹⁶

3.1.3 Use of impact assessments

In addition to pledging more extensive consultation of the public and other interested parties on major policy initiatives, the Commission's "better law-making" Communication of 2002 also promised a more "systematic approach to assessing the impact of initiatives, especially legislative

¹⁶ Information from European Commission, 'Closed consultations' and http://ec.europa.eu/yourvoice/consultations/2013/index_en.htm and 'Consultations by policy area', http://ec.europa.eu/yourvoice/consultations/links/index_en.htm

ones.” This would entail the employment of a “general-purpose impact analysis tool” to be implemented “gradually from 2003” and “applied to all initiatives undertaken under the Commission’s programme of work.”

While the Commission wanted to avoid “excessively long or over-costly evaluation” that would block the legislative process, it promised to provide legislators with “more accurate and better structured information on the positive and negative impacts [of its proposals], having regard to economic, social and environmental aspects.” The exercise would be “a decision-making aid” but would expressly avoid “taking the place of political judgment.”¹⁷ A subsequent Communication set out a basic format for future impact assessments.¹⁸ In 2006 an Impact Assessment Board was established within the Commission “to provide independent quality control and quality support for Commission impact assessments”, examining “all draft impact assessment (IA) reports against the quality standards set out in the IA guidelines, and issues opinions with recommendations on how the impact assessments should be improved.”¹⁹

As with public consultations, the aim was also to eventually carry out impact assessments “for all major initiatives, i.e. those which are presented in the Annual Policy Strategy or later in the Work Programme of the Commission.”²⁰ This included “the most important Commission initiatives and those having the most far reaching impacts” (criteria that could be considered to somewhat pre-empt the assessments themselves):

- Legislative proposals which have significant economic, social and environmental impacts;
- Non-legislative initiatives (white papers, action plans, expenditure programmes, negotiating guidelines for international agreements) which define future policies;
- Certain implementing measures (so called ‘comitology’ items) and delegated acts which are likely to have significant impacts).²¹

It is clear that the use of impact assessments for measures adopted in the name of counter-terrorism has become more systematic over the years, in particular with regard to Directives and Regulations. Nevertheless, only 22 of the 88 legally binding counter-terrorism measures (25%) we have identified have been the subject of such evaluations. The 25 Decisions have had four assessments (16%), the 15 Directives have had 11 (73%), the 11 Framework Decisions one (9%), and the 25 Regulations six (24%). It is worth noting that no legislative proposal that originated in the Council has ever been subjected to an impact assessment. Eight of the 25 Decisions were proposed by national delegations within the Council,²² as were six of the 11 Framework Decisions²³ and one of the 25 Regulations.²⁴

¹⁷ European Commission, ‘European governance: Better lawmaking’, COM(2002) 275 final, 5 June 2002, p.3-4, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF>

¹⁸ European Commission, ‘Communication from the Commission on Impact Assessment’, COM(2002) 276 final, 5 June 2002, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0276:FIN:EN:PDF>

¹⁹ European Commission, ‘Impact Assessment Board Report for 2012’, p.3, http://ec.europa.eu/governance/impact/key_docs/docs/iab_report_2012_en_final.pdf

²⁰ Ibid.

²¹ European Commission, ‘Commission initiatives requiring an impact assessment’, http://ec.europa.eu/governance/impact/which_com_init/which_com_init_en.htm

²² Eurojust (Portugal, France, Sweden, Belgium), <http://register.consilium.europa.eu/pdf/en/00/st10/st10357.en00.pdf>; peer evaluation of member states’ counter-terrorism provisions (Spain), <http://register.consilium.europa.eu/pdf/en/02/st08/st08831.en02.pdf>; police and judicial cooperation measures in accordance with Common Position 2001/931/CFSP (Spain), <http://register.consilium.europa.eu/pdf/en/02/st07/st07756.en02.pdf>; new functions for the SIS (Spain), <http://register.consilium.europa.eu/pdf/en/02/st07/st07756.en02.pdf>; increased cooperation between national Asset Recovery Offices (Austria, Belgium, Finland), <http://register.consilium.europa.eu/pdf/en/06/st07/st07259.en06.pdf>; the Prüm Decision (Belgium, Bulgaria, Germany, Spain, France, Luxembourg, Netherlands, Austria, Slovenia, Slovakia, Italy, Finland, Portugal, Romania, Sweden), <http://register.consilium.europa.eu/pdf/en/07/st06/st06566.en07.pdf>; implementation of the Prüm Decision (Germany), <http://register.consilium.europa.eu/pdf/en/07/st11/st11563.en07.pdf>; increased cooperation between national special forces units (Austria), <http://register.consilium.europa.eu/pdf/en/06/st15/st15437.en06.pdf>

²³ Joint investigation teams (Belgium, France, Spain, UK), <http://www.statewatch.org/semDOC/assets/files/council/11990-01.pdf>; freezing of assets or evidence (France, Spain, Belgium),

Of course, the mere existence of an impact assessment procedure is no guarantee of a full review of the likely impact of any given measure. A 2009 assessment of the Commission's use of impact assessments in environmental policy concludes that due to the number of differing interests involved in crafting European Union legislation, "impact assessment is at the core of [a] negotiation process and is therefore a political balancing act. Consequently, the IA process cannot be regarded as solely a knowledge instrument."²⁵ With this apparently in mind, the European Parliament has recently commissioned a number of studies that interrogate the assumptions and processes used by the Commission in specific impact assessments, including for those legislative proposals on the control of narcotic drug precursors,²⁶ measures to prevent counterfeiting of the Euro,²⁷ the prevention of money laundering and terrorist financing,²⁸ the conditions of entry into the EU for certain third country-nationals,²⁹ and the 'smart borders' package.³⁰ Some of the findings have challenged the legitimacy of the Commission's impact assessment procedure. The study on the 'smart borders' package (proposals to establish an 'Entry-Exit System' to record the fingerprints and movement of all third-country nationals into and out of the Schengen area and a 'Registered Traveller Programme' to speed the entry of pre-vetted travellers), for example, suggested that "it is difficult to escape the conclusion that having decided to pursue smart borders as a political objective in 2008...the Commission has concentrated on 'selling' the policies at the expense of impartially evaluating their necessity, feasibility and impact".³¹ It also found that the Commission had misrepresented the findings of external contractors with regard to the feasibility and estimated costs of the proposed systems,³² and recommended that the European Parliament establish a more robust process for examining impact assessments based on the methodology and processes used by the Congressional Research Service in the USA.³³

<http://register.consilium.europa.eu/pdf/en/01/st05/st05126.en01.pdf>; confiscation of crime-related proceeds, instrumentalities and property (Denmark), <http://register.consilium.europa.eu/pdf/en/02/st10/st10697.en02.pdf>; mutual recognition of confiscation orders (Denmark), <http://register.consilium.europa.eu/pdf/en/02/st10/st10701.en02.pdf>; simplifying the exchange of information between law enforcement authorities (Sweden), <http://register.consilium.europa.eu/pdf/en/04/st10/st10215.en04.pdf>; European enforcement order (Austria, Finland, Sweden), <http://register.consilium.europa.eu/pdf/en/05/st07/st07307.en05.pdf>;

²⁴ Introduction of new functions for the SIS (Spain), <http://register.consilium.europa.eu/pdf/en/02/st09/st09407.en02.pdf>

²⁵ Ann-Katrin Bäcklund (2009) 'Impact assessment in the European Commission – a system with multiple objectives', *Environmental Science & Policy*, 12, p.1085

²⁶ 'European Commission proposal for a Regulation amending Regulation (EC) No 273/2004 on drug precursors', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/496747/IPOL-JOIN_NT%282013%29496747_EN.pdf

²⁷ 'European Commission proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/508964/IPOL-JOIN_NT%282013%29508964_EN.pdf

²⁸ 'European Commission proposals for a Directive on money laundering and terrorist financing and for a Regulation on transfer of funds', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/508970/IPOL-JOIN_NT%282013%29508970_EN.pdf

²⁹ 'European Commission proposal on the conditions of admission of third-country national students, researchers, school pupils, volunteers, remunerated and unremunerated trainees and au pairs', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514065/IPOL-JOIN_NT%282013%29514065_EN.pdf

³⁰ 'Smart Borders Package: European Commission proposal on the entry/exit data of third-country nationals crossing the external borders of the EU', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514062/IPOL-JOIN_NT%282013%29514062_EN.pdf; 'Smart Borders Package: European Commission proposal on a Registered Traveller Programme', http://www.europarl.europa.eu/RegData/etudes/note/join/2013/514063/IPOL-JOIN_NT%282013%29514063_EN.pdf

³¹ Bigo, D., Hayes, B., Jeandesboz, J. & Simon, S. (forthcoming 2013) *The Commission's legislative proposals on Smart Borders: their feasibility and costs*. Brussels: European Parliament, PE 493.026, p.23.

³² *Ibid.*, pp.27 and 37-38.

³³ *Ibid.*, p.44.

3.2 The decision-making process

3.2.1 Involvement of the European Parliament

Upon completion of any *ex-ante* procedures, formal legislative proposals are adopted by the European Commission, published and sent to the EU's twin legislative bodies: the Council of the EU, comprising the member states, and the European Parliament. These are usually now accompanied by 'Commission Staff Working Documents' containing the impact assessment and other information that attempts to explain why the Commission has decided upon a particular course of action. Following the publication of a proposal working parties within the Council of the European Union will examine the text, as will those committees of the European Parliament that opt to offer an opinion.

The entry into force of the Lisbon Treaty technically abolished the 'pillar' structure of the EU and gave new powers to the Parliament. Under the pillar structure the first or Community pillar encompassed social, economic and environmental policy; the second the Common Foreign and Security Policy; and the third police and judicial cooperation. While it has been abolished, many of its core features remain, particularly with respect to decision-making on military, internal security and foreign policy issues.

Importantly, many of the EU's counter-terrorism measures were adopted under the old third pillar rules, meaning that the Parliament had no real power to alter the draft legislation. Under the 1993 Maastricht Treaty the European Parliament "could do no more than give an opinion on certain acts and was consulted only on the principal aspects of activities of Title IV [of the Treaty],"³⁴ containing provisions that amended the European Atomic Energy Community Treaty. The 1999 Amsterdam Treaty expanded its role slightly, making it obligatory for the Council to consult Parliament before adopting third pillar legislation. Nevertheless, the European Parliament had no power to make amendments to legislation and the Council was free to ignore the Parliamentary opinions (and frequently did so). This changed in May 2006 for EU border control, immigration and asylum legislation and in December 2009 for policing, criminal law and the other areas of justice and home affairs policy.

With the entry into force of the Lisbon Treaty the majority of primary EU legislation is now subject to the co-decision procedure (formally known as the ordinary legislative procedure), under which Parliament and Council are obliged to reach agreement by negotiation on new legislation. Parliament's role remains more strictly limited in some instances – for example, the special legislative procedure/consultation still applies to a number of policy areas such as competition law, internal market exemptions and certain budgetary issues. Other procedures such as consent, opinion and codification mean that rules other than those applicable under the ordinary legislative procedure remain in place in other cases.³⁵ The Commission also retains unilateral legislative decision-making powers remain in respect to secondary/implementing legislation, while organs of the Council of the EU enjoy the same with regard to many security, military and foreign policy matters.

Turning to the 88 legally binding EU counter-terrorism laws adopted since September 2001, 70 (79.5%) were the subject of deliberations by the European Parliament but the majority of these deliberations (44 or 50% in respect to all EU CTMs) took place as part of the consultation procedure,³⁶ thus strictly limiting their impact. Co-decision, where the Parliament enjoys full legislative powers, only occurred in respect to 23 of the measures.³⁷ One can conclude, therefore,

³⁴ European Commission, 'The decision-making process under the third pillar', http://europa.eu/legislation_summaries/other/114543_en.htm

³⁵ European Parliament, 'Legislative powers', <http://www.europarl.europa.eu/aboutparliament/en/0081f4b3c7/Law-making-procedures-in-detail.html>

³⁶ Assessing the extent to which the Council took into account parliamentary opinion in each case of the consultation procedure is beyond the scope of this report.

³⁷ Three other procedures were used once each – own-initiative (INI), where MEPs decide to issue a non-binding resolution or opinion on an issue or proposal; non-legislative enactment (NLE), which applied to the EU-US Terrorist Finance Tracking Programme Agreement; and resolution on topical subject (RSP), which applied to a number of EU-US

that the European Parliament was excluded from what is now the normal EU decision-making process in respect to three-quarters of the EU's 88 most important pieces of counter-terrorism legislation.

Figure 3: Assessment of legislation by the European Parliament by type of procedure

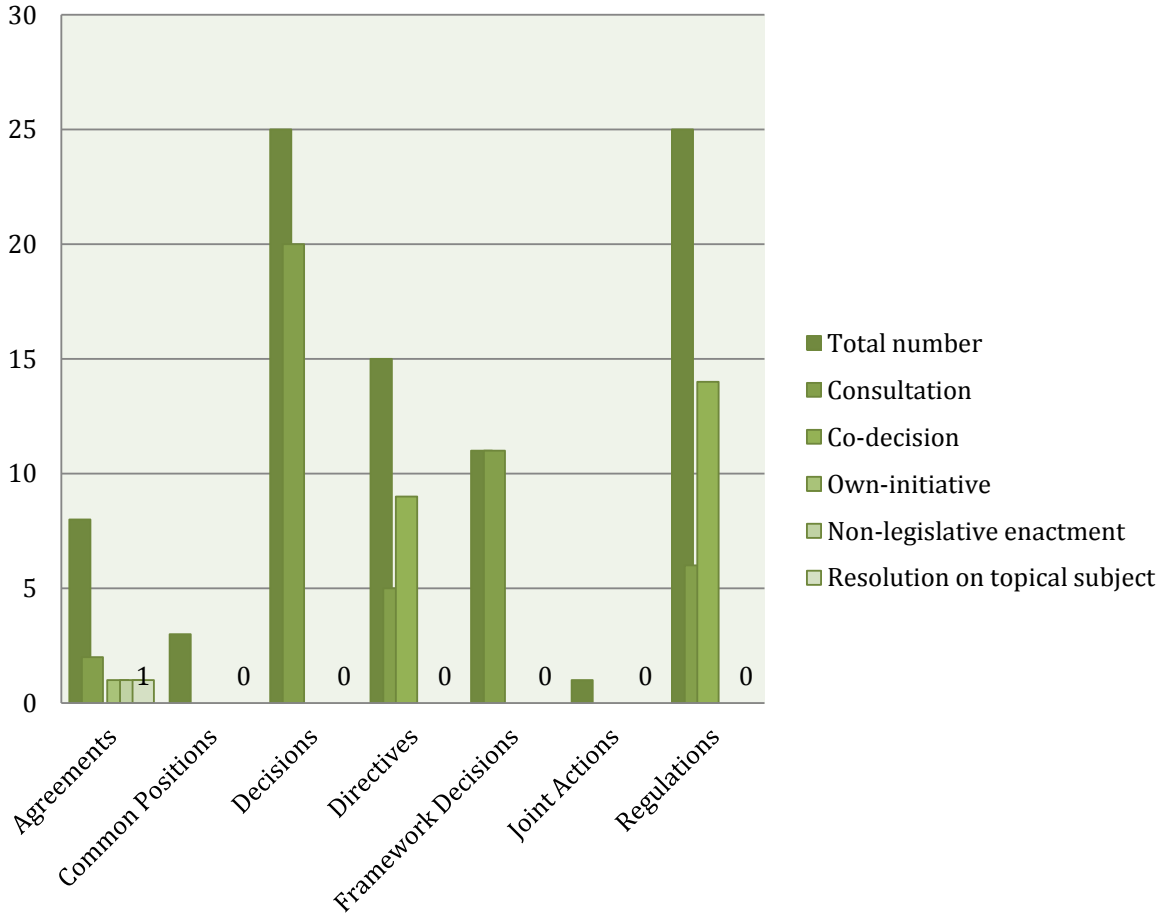
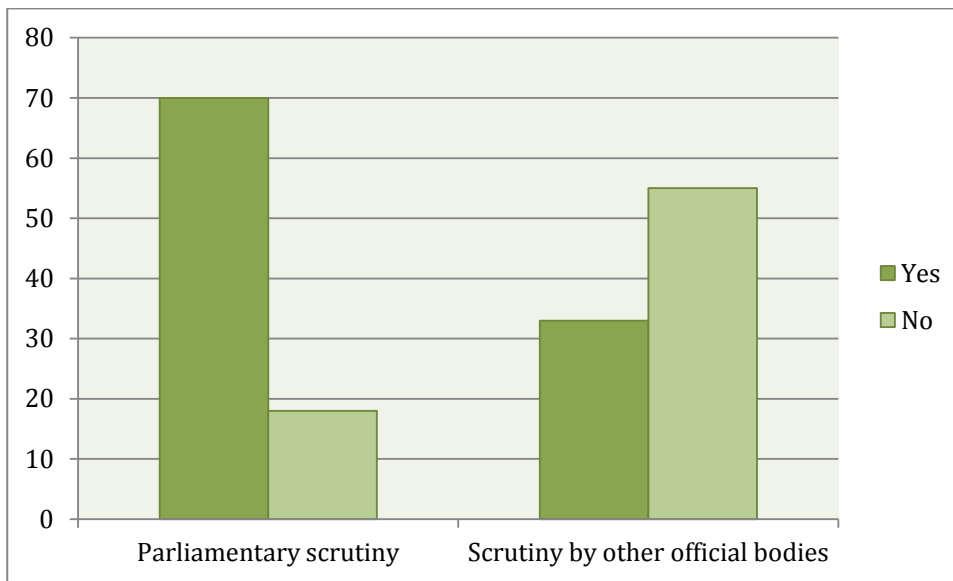


Figure 4: Decision-making process assessment procedures

3.2.2 Involvement of advisory bodies

Both the Parliament and the Council have working parties specialised in dealing with specific policy areas. When the Commission publishes a legislative proposal, relevant parliamentary committees will determine whether they wish to deal with it, and will subsequently nominate a rapporteur for the proposal. In the Council, proposals are presented before one or more working groups specialised in particular policy areas (e.g. law enforcement, terrorism, internal security) which will then deliberate upon the proposal.

Article 300 of the Lisbon Treaty states that “the European Parliament, the Council and the Commission shall be advised by an Economic and Social Committee [ECSC] and a Committee of the Regions [CoR], exercising advisory functions.” The two bodies are independent and obliged to act in “the Union’s general interest”. Under the Lisbon Treaty the consultation of these two bodies is mandatory when passing legislation, although if they choose to issue opinions their advice is not binding upon the Parliament, Council or Commission. Article 127 of the Lisbon Treaty also obliges consultation of the European Central Bank (ECB) “on any proposed Union act in its fields of competence” – for the purposes of this study, those relating to money laundering and terrorist financing. Another body that frequently takes an interest in the legislative process is the European Data Protection Supervisor, an “independent supervisory authority” established in line with Regulation (EC) No 45/2001.³⁸ Like the ECSC and CoR, his advice is not binding, and consultation of the EDPS is not obligatory. However, the authority frequently issues opinions on legislative and policy proposals.

Many observers, *Statewatch* included, had hoped that the launch of the EU Fundamental Rights Agency (FRA) in March 2007 would also have a bearing on the legislative process and assessments as to the legitimacy and impact of draft EU legislation, but this has not been the case (see further section 3.4.3, below). Nevertheless the Council does have the possibility of using a standardised, formalised procedure for checking the compatibility of a proposal with fundamental rights obligations. In May 2011, the Council’s Working Party on Fundamental Rights, Citizens Rights and Free Movements of Persons (FREMP) produced ‘Guidelines on methodological steps

³⁸ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data,
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/DataProt/Legislation/Reg_45-2001_EN.pdf

to be taken to check fundamental rights compatibility at the Council's preparatory bodies'.³⁹ These were produced in order to try and ensure that fundamental rights (as laid out in the EU Charter) were taken into account during preparatory work undertaken in the Council's numerous working parties and preparatory bodies. They provide advice on checking whether proposals affect fundamental rights; how to think "from a fundamental rights perspective"; examining legislative proposals in relation to jurisprudence, and so on. However, the Guidelines only provide for "non-binding advice" and they do not yet appear to have ever been used by any Council working party in respect to any draft EU legislation, at least in the JHA field.

The degree of input that the other aforementioned advisory bodies have had into the legislative process with regard to the 88 counter-terrorism measures that this report is concerned with is slightly more impressive if varied. For the eight international agreements we have identified, the EDPS issued an opinion on four of them. No body issued opinions on any of the three Common Positions, nor on the one Joint Action. The 25 Decisions received a total of 10 opinions (5 from the EDPS, 3 from the ECSC and 2 from the CoR); the 15 Directives 13 opinions (two from the EDPs, seven from the ECSC, one from the CoR, three from the ECB); the 11 Framework Decisions received one opinion from the EDPS; and the 25 Regulations 14 opinions (four from the EDPS, 9 from the ECSC and 1 from the ECB). In all cases, these reports were merely advisory and did not have binding effect.

³⁹ General Secretariat of the Council, 'Guidelines of methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies', 10140/11, 18 May 2011, <http://register.consilium.europa.eu/pdf/en/11/st10/st10140.en11.pdf>

3.3. Ex-post assessment procedures

Once legislation has been adopted, it must be implemented by the member states, EU bodies or private actors (or a combination of these stakeholders). Depending on the legislative instrument in question and the provisions made by the legislator, the implementation or transposition of the legislation may be subject to a review by the European Commission, Council of the EU or the expert advisors/contractors. However, as noted in our report on the transposition of EU legislation, the primary concern in respect to measures adopted in the name of counter-terrorism has been whether or not the member states have implemented the legislation rather than how effective that legislation has been in respect to its purported aims (see SECILE deliverable 2.2). Whereas the transposition of EU Directives is subject to systematic monitoring by the European Commission, the *ex-post* review of other instruments has been more *ad hoc*.

Occasionally, the European Parliament may also Commission expert reviews on issues of interest, although they have no binding power and tend to examine a policy framework or legal field rather than specific legal measures. In recent years these studies have covered topics such as 'Current and Forthcoming Proposals on JHA Databases and a Smart Borders System at EU External Borders',⁴⁰ 'Europe's Crime-Terror Nexus: Links Between Terrorist and Organised Crime Groups in the European Union',⁴¹ 'The Results of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in Light of the New Legal Framework Following the Lisbon Treaty',⁴² 'Developing an EU Internal Security Strategy, Fighting Terrorism and Organised Crime',⁴³ and 'Parliamentary Oversight of Security and Intelligence Agencies in the European Union'.⁴⁴

Of the 88 legally binding counter-terrorism measures identified in our research, 59 (or 67 per cent) contain provisions for review by the European Commission (see Figures 5 and 6, below) and nine of these provide for further reviews by the Council. One third of the EU's legally binding CTMs contain no provisions for review at all, suggesting little or no concern for their impact or effectiveness. Of the 59 measures that are subject to review by the Commission, only 33 of those reviews can be located. Sixteen reviews have either not taken place or cannot be located while a further ten are yet to be undertaken in accordance with the deadline provided for in the legislation.

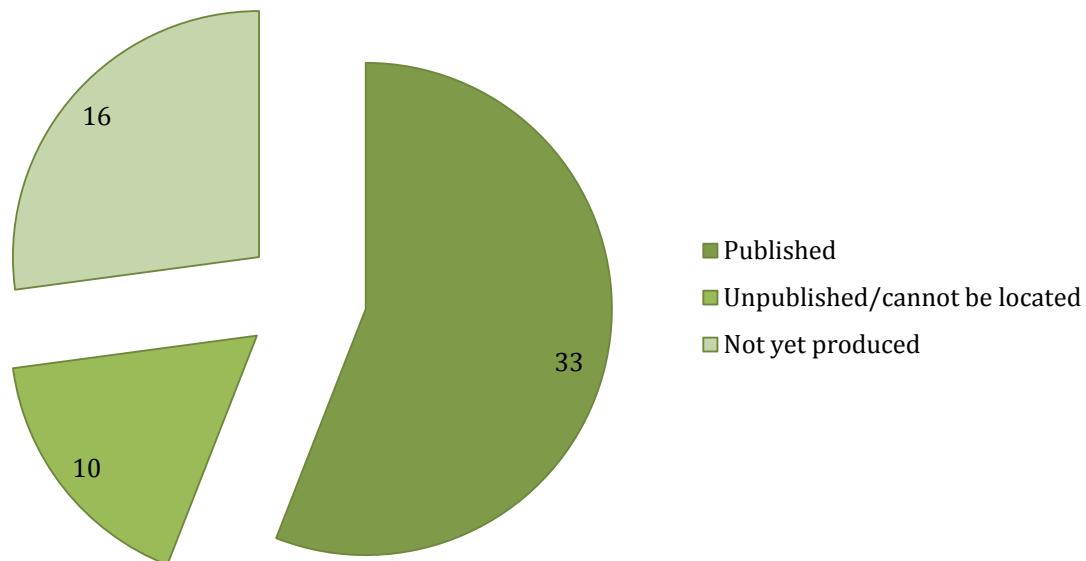
⁴⁰ November 2012, http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462513/IPOL-LIBE_ET%282012%29462513_EN.pdf

⁴¹ October 2012, <http://www.europarl.europa.eu/document/activities/cont/201211/20121127ATT56707/20121127ATT56707EN.pdf>

⁴² May 2012, http://www.europarl.europa.eu/RegData/etudes/note/JOIN/2012/462456/IPOL-LIBE_NT%282012%29462456_EN.pdf

⁴³ November 2011, <http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47777/20120627ATT47777EN.pdf>

⁴⁴ June 2011, <http://www.europarl.europa.eu/document/activities/cont/201109/20110927ATT27674/20110927ATT27674EN.pdf>

Figure 5: Commission reviews - status

Three of the eight Agreements contains provisions requiring review; of those reviews, two are yet to be carried out (on the EU-US Agreements on extradition and mutual legal assistance, due in January 2015) and one is not publicly available (a review of the 2005 EU-Canada PNR/API Agreement). One of the three Common Positions (2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol) has had a review, mandated by Article 4 of the legislation and carried out in 2006.⁴⁵

Of the 25 Decisions, 14 have provisions permitting review by the Commission or Council. Four of these could not be located, while one report – on the Council Decision setting up Eurojust – was produced despite the legislation containing no provisions for review. The Commission deemed this necessary because a “considerable number of Member States need to adapt national law provisions and since Eurojust plays a very important role for criminal justice both within the EU and for judicial cooperation with third countries.”⁴⁶

13 *ex-post* reports have been produced on the 15 Directives, a reflection of the more systematic procedures in place for the assessment of this type of legislation. One of these, on Directive 2001/97/EC of 4 December 2001 on prevention of the use of the financial system for the purpose of money laundering, could not be located. Four will be produced in the months and years to come, depending on the timetable set down in the legislation.

⁴⁵ European Commission, 'Report from the Commission on the operation of Council Common Position 2005/69/JHA', COM(2006) 167 final, 21 April 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0167:FIN:EN:PDF>

⁴⁶ European Commission, 'Report from the Commission On the Legal Transposition of the council Decision of 28 February 2002 Setting up Eurojust with a View to Reinforcing the Fight Against Serious Crime', COM(2004) 457 final, 6 July 2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0457:FIN:EN:PDF> and 'Annex to the Report', SEC(2004) 884, 6 July 2004, http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_id1049_2_SEC.2004.884.pdf

Of the 11 Framework Decisions, all but two have been the subject of Commission evaluation reports. A review of the Framework Decision on the European evidence warrant⁴⁷ is due to be produced no later than January 2014, and one on the Framework Decision on the exchange of information extracted from criminal records⁴⁸ is due by 27 April 2015. There are also publicly accessible Council assessments of two Framework Decisions,⁴⁹ while for two others the Council's assessments (based on the Commission's reviews) could not be located.⁵⁰ The Council is next year supposed to review the Framework Decision on the European evidence warrant on the basis of the Commission's report, due in January 2014.

Article 5 of the sole Joint Action we have identified relating to counter-terrorism obliges the Council to draw up reports on the basis of information provided by the Presidency, the Secretary-General/High Representative, and the African Centre for Study and Research on Terrorism, as well as evaluating a project mandated by Article 2, involving "audit missions on national counter-terrorism arrangements and providing advice and reorganisation in the Member States of the African Union".⁵¹ It does not appear that either of these reports has ever been published.

Of the 25 Regulations, five Council and/or Commission reviews have been carried out, while another five are due in the future. The text of two Regulations - Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and Parliament and Council Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfer of funds – mandates reports, but neither of these could be located. One other Regulation mentions an evaluation report only in the preamble to the legislation.⁵²

Reviews of legislation are also occasionally undertaken by contractors and 'expert groups', although with far less frequency than reviews by the Commission or the Council. None of the Agreements, Common Positions and the Joint Action we have identified have ever been subjected to such 'external' reviews. Three such reviews have been produced for the 25 Decisions (although one cannot be located),⁵³ and one has been produced for the 15 Directives.⁵⁴ One has also been

⁴⁷ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF>

⁴⁸ Council Framework Decision 2009/315/JHA of 25 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF>

⁴⁹ One on Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, <http://www.statewatch.org/news/2011/oct/eu-council-swed-init-implementation-13970-11.pdf> and one on Council

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, <http://register.consilium.europa.eu/pdf/en/12/st06/st06345-re03.en12.pdf>

⁵⁰ Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:069:0067:0071:EN:PDF> and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:EN:PDF>

⁵¹ Joint Action 2007/501/CFSP of 16 July 2007 on cooperation with the African Centre for Study and Research on Terrorism in the framework of the implementation of the European Union counter-terrorism strategy, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:185:0031:0034:EN:PDF>

⁵² Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EC) No 920/2010 and No 1193/2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:122:0001:0059:EN:PDF>

⁵³ Council Decision 2006/970/Euratom concerning the Seventh Framework Programme of the European Atomic Energy Community (Euratom) of 18 December 2006 for nuclear research and training activities (2007 to 2011) was the subject of an 'expert panel interim report',

<http://ec.europa.eu/transparency/regdoc/rep/eims/RTD/136536/EURATOM%20FP7%20interim.pdf> and Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) was the subject of an evaluation by the consultancy firm RAND Europe,

https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf; the General Programme on Security and Safeguarding Liberties (which has two implementing Decisions) has apparently been reviewed, but this cannot be located.

undertaken for one the 25 Regulations⁵⁵ and two other Regulations provide for such reviews in the future.⁵⁶ Of course, in all of these cases the terms of reference are crucial. *RAND Europe's* 250-page 'Evaluation of the implementation of the Europol Council Decision and of Europol's activities',⁵⁷ for example, was criticised by researchers at the Centre for European Policy Studies who observed that "[S]omewhat surprisingly, an extensive evaluation commissioned by Europol's Management Board and carried out by the consultancy firm RAND Europe makes no mention of the [Organised Crime Threat Assessment] methodology or the quality of Europol's strategic analysis products. This seems a stark omission given the range of critiques levelled at the OCTA by external researchers."⁵⁸

Figure 6: Post-legislative assessment procedures



⁵⁴ Parliament and Council Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC was reviewed by Tipik Communication Agency, http://ec.europa.eu/internal_market/payments/docs/framework/transposition/psd_transposition_study_report_en.pdf

⁵⁵ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was reviewed by the consultancy COWI in January 2009, <http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf>

⁵⁶ Parliament and Council Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union is due to be evaluated in 2014; Parliament and Council Regulation (EU) No 100/2013 of 15 January 2013 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency requires an external review every five years.

⁵⁷ https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf

⁵⁸ Joanna Parkin, 'EU Home Affairs Agencies and the Construction of EU Internal Security', Centre for European Policy Studies, December 2012, <http://www.ceps.eu/book/eu-home-affairs-agencies-and-construction-eu-internal-security>

3.4 Substantive reviews of EU counter-terrorism policy

3.4.1 The peer-review mechanism

In December 1997 the Council of the European Union adopted a Joint Action aimed at “establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime” - in short, a system that would let EU member states judge each others’ legislation and policies for dealing with organised crime.⁵⁹ On 20 September 2011 the EU’s Justice and Home Affairs Council adopted a set of conclusions that sought to update this mechanism:

“[I]n order to define a procedure for the peer assessment of national anti-terrorist arrangements on the basis of considerations of a legislative (e.g. examination of the legislation in certain Member States making it possible to carry out administrative telephone tapping or to draw up a list of terrorist organisations), administrative and technical nature.”⁶⁰

The Council wanted to receive an “evaluation report together with proposals by the end of 2002”, and “two national experts specialising in counter-terrorism and seconded from police and intelligence services” were placed within the General Secretariat of the Council in order to assist with the process.

As with the majority of assessments of counter-terrorism measures undertaken by the EU institutions, the report came some time later than intended – an initial report containing information on the evaluation of 15 member states was produced in November 2004,⁶¹ and a final report containing information on 25 member states was produced in September 2005.⁶² This aimed to provide an analysis of member states’ structures and capabilities for the fight against terrorism; to highlight good practices and to give recommendations where national structures needed to be improved; and to identify practices likely to be possibly applied other Member States in addition to recommendations at EU level. To these ends the report focused on the national responsibilities of government ministries, security and intelligence, and law enforcement agencies; and the level of national and international coordination and cooperation, including exchange of information, in particular that relating to “Islamist extremist terrorism”.

Evaluation took place through two questionnaires and “on-site visits from June 2003 to May 2005 by teams consisting respectively of experts from Member States [2 experts], Commission (1), General Secretariat of the Council (2) and Europol (1).”⁶³ The process resulted in numerous recommendations to the member states highlighting “those elements of good practice which might usefully be applied in all (or most) member states.” It was expected that member states should implement recommendations “with regard to [their] national legal and political framework”, and that this “may require constitutional, legal or structural changes to current national arrangements.” Indeed, the “core” recommendations addressed “coordination and cooperation” (the establishment where it does not already exist of inter-agency cooperation as well as centralised, hierarchical bodies responsible for counter-terrorism policy and activities, and the setting up of “an authority (e.g. a National Authority) with responsibility for coordination among prosecution services”); threat

⁵⁹ Joint Action 1997/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997F0827:EN:HTML>

⁶⁰ Justice and Home Affairs Council, Council conclusions, 12156/01, 20 September 2001, <http://register.consilium.europa.eu/pdf/en/01/st12/st12156.en01.pdf>

⁶¹ This was partially declassified in March 2011: Council of the European Union, 'Interim Report on the Evaluation of National Anti-Terrorist Arrangements', 14306/04 EXT 1, 5 November 2004, <http://register.consilium.europa.eu/pdf/en/04/st14/st14306-ex01.en04.pdf>

⁶² Presidency in cooperation with the Counter Terrorism Coordinator, 'Final report on the Evaluation of National Anti-Terrorist Arrangements: Improving national machinery and capability for the fight against terrorism', 12168/3/05, 26 September 2005, <http://register.consilium.europa.eu/pdf/en/05/st12/st12168-re03.en05.pdf>

⁶³ Presidency in cooperation with the Counter Terrorism Coordinator, 'Final report on the Evaluation of National Anti-Terrorist Arrangements: Improving national machinery and capability for the fight against terrorism', 12168/05, 26 September 2005, <http://register.consilium.europa.eu/pdf/en/05/st12/st12168.en05.pdf>

assessment, information collection and access to databases (seeking the use of “all-source threat assessments” through newly optimised collection and exchange of information, along with “appropriate legislation allowing security services to get access to law enforcement and other relevant governmental agencies/bodies’ databases”); and police training and border control.

“Other significant recommendations” included the use of intelligence as evidence (“its use could undoubtedly have an impact in reinforcing national capacity to prosecute those accused of terrorist activities. Member states are invited to pay attention to this issue and to take necessary steps where needed”); providing the legal base for a range of investigative techniques (with member states called upon to “provide their competent authorities with the legal base necessary for them to take full advantage of the range of investigative techniques, both technical and non-technical”); secure communications systems and security clearances; and crisis management.

Recommendations for actions at the EU level called for member states' authorities to work more closely with Europol, Eurojust, the EU Situation Centre (now INTCEN and housed within the European External Action Service) and CEPOL, the European Police College, soon to be moved from Bramshill in the UK to Budapest.

The practice envisaged by some of these recommendations has been particularly controversial in some EU member states. Yet apart from noting that the implementation of the recommendations “may require constitutional, legal or structural changes to current national arrangements,” the Council's final report does not raise any questions about whether such changes may have an impact on fundamental rights or democratic control. Potential concerns surrounding legitimacy and effectiveness of the recommendations are not touched on at all, and it would seem that they are taken as *de facto* resolved or perhaps even irrelevant. The report notes that “some member states have already implemented recommendations as listed in the country reports and the interim report or are in the process of implementing them, including new legislation where needed.” Details of the member states making these changes are contained in an addendum, which has not been published. A number of the country reports carried out for the exercise were declassified in 2011 and 2012.⁶⁴

Each Member State was also expected to “report back on the improvements it has made to its national counter-terrorism arrangements, and in particular on how they have responded to the recommendations of the relevant country report and, where appropriate, the recommendations of the final report.” This was done through the Council's Working Party on Terrorism between January and October 2006, with a joint report produced by the then German Presidency and the Counter Terrorism Coordinator noting “that the peer evaluation process has contributed in a significant way

⁶⁴ Austria, <http://register.consilium.europa.eu/pdf/en/04/st13/st13944-re01.en04.pdf>;
Belgium, <http://register.consilium.europa.eu/pdf/en/04/st09/st09216-ex01.en04.pdf>;
Bulgaria, <http://register.consilium.europa.eu/pdf/en/06/st06/st06883-ex01.en06.pdf>;
Denmark, <http://register.consilium.europa.eu/pdf/en/04/st11/st11078-re01.en04.pdf>;
Estonia, <http://register.consilium.europa.eu/pdf/en/05/st09/st09103-ex01.en05.pdf>;
Greece, <http://register.consilium.europa.eu/pdf/en/04/st12/st12633-ex01.en04.pdf>;
Spain, <http://register.consilium.europa.eu/pdf/en/04/st11/st11348-ex01.en04.pdf>;
Finland, <http://register.consilium.europa.eu/pdf/en/04/st13/st13927-re01.en04.pdf>;
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Ireland, <http://register.consilium.europa.eu/pdf/en/04/st09/st09770-ex01.en04.pdf>;
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Lithuania, <http://register.consilium.europa.eu/pdf/en/05/st10/st10997-re01.en05.pdf>;
Luxembourg, <http://register.consilium.europa.eu/pdf/en/04/st12/st12597-re01ex01.en04.pdf>;
Malta, <http://register.consilium.europa.eu/pdf/en/05/st11/st11343-ex01.en05.pdf>;
Netherlands, <http://register.consilium.europa.eu/pdf/en/04/st12/st12247-re01.en04.pdf>;
Poland, <http://register.consilium.europa.eu/pdf/en/05/st09/st09046-ex01.en05.pdf>;
Portugal, <http://register.consilium.europa.eu/pdf/en/04/st11/st11352-re01ex01.en04.pdf>;
Slovakia, <http://register.consilium.europa.eu/pdf/en/05/st10/st10379-ex01.en05.pdf>;
Slovenia, <http://register.consilium.europa.eu/pdf/en/05/st07/st07413-ex01.en05.pdf>;
Sweden, <http://register.consilium.europa.eu/pdf/en/04/st13/st13510-ex01.en04.pdf>;
UK, <http://register.consilium.europa.eu/pdf/en/04/st14/st14471-ex01.en04.pdf>

to the reform of counter-terrorism arrangements in the member states.”⁶⁵ In contrast to the lethargy that the EU member states had shown in transposing EU counter-terrorism laws (see SECILE deliverable 2.2), the report claims that “27 member states were invited to implement all the general recommendations. Out of the total of 432 (27x16 recommendations), 421 have been implemented or are being implemented” - and this because “11 recommendations were considered by member states as not relevant”.

The perceived success of the first round of peer evaluations led to a second, beginning in 2007 and completed in 2010, which focused on “preparedness and consequence management” in case of a terrorist attack: “Up to then, national crisis-management arrangements had not been the subject of either in-depth evaluation or policy consideration at EU level”.⁶⁶ The process followed the same pattern as for the first round of evaluations: a questionnaire, country visits (conducted by officials from the member states, Europol and the Commission), national reports and an overall evaluation report. The topics covered were: structures and organisational framework of national crisis centres; training/exercises to test national crisis centres and communication systems in the event of a terrorist attack; and soft targets. The evaluation process was again considered a resounding success,⁶⁷ producing detailed recommendations to the member states and EU institutions.⁶⁸ Similar recommendations appeared in an EU Council Recommendation on public order adopted in 2011.⁶⁹

3.4.2 The Network of Independent Experts on Fundamental Rights

The Network of Independent Experts on Fundamental Rights (CFR-CDF) was created by the European Commission in response to a recommendation in the European Parliament’s report on the state of fundamental rights in the European Union in 2000.⁷⁰ Specifically, the parliament requested that “a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States’ national and constitutional courts.” The Network was formally established in September 2002 and produced four (very detailed) Annual Reports covering the period 2002-

⁶⁵ Presidency and Counter Terrorism Coordinator, 'Follow-up report on the implementation of recommendations by the Council of the EU on counter-terrorism measures in the member states – executive summary', 5356/07, 6 March 2007, <http://register.consilium.europa.eu/pdf/en/07/st05/st05356.en07.pdf>

⁶⁶ General Secretariat, 'Second round of peer evaluation: Preparedness and consequence management in the event of a terrorist attack – Final report', 8568/10, 16 April 2010, <http://register.consilium.europa.eu/pdf/en/10/st08/st08568.en10.pdf>

⁶⁷ The main findings were: (i) there are numerous differences between national systems used to “manage the consequences of a terrorist incident... adapted to the size, geography and population distribution in the country”; (ii) the main factor influencing these differences is the legal framework for differing political models: “Some countries have very active political structures which intervene down to the operational decision-making level, and in others the political authorities play a more strategic role”; (iii) different models can be “equally efficient if the coordination process is not too complex or theoretical”; (iv) national plans for various kinds of emergencies, including terrorism, can “sometimes create too rigid a model which can create some difficulties when it comes to adapting the pre-established measure to the actual situation”, while some member states have no specific plans, just one general “umbrella model” plan; (v) some member states favour plans in which local authorities act first, while in others the central authorities are involved from the beginning of a declaration of emergency, which is “frequently a country’s way of compensating for limited crisis-management resources”; (vi) the set-up and operation of national crisis centres differs from state to state, with full time permanent structure in some, ad hoc structures in others, and in others a physical space but one which is only activated in case of emergency; (vii) all member states organise “exercises” but in some cases these are only “table-top”, while “in some cases the number of exercises in cooperation with neighbouring countries (member states or not) are not sufficient”; (viii) countries are at different stages of moving from analogue to digital communications networks, but all at least have a plan in place to move from the former to the latter; (ix) soft targets are assessed and dealt with in different ways in different states – in some in the same way as critical infrastructure, in others as a separate issue.

⁶⁸ The recommendations covered structural issues (the need for national planning and crisis coordination centres), communications (within and between states and with the public) and cooperation (between the private and public sectors and between civilian and military authorities).

⁶⁹ 'Security of the spectacle: The EU’s guidelines for security at major events', *Statewatch Analysis*, December 2012, <http://www.statewatch.org/analyses/no-207-major-events-public-order.pdf>

⁷⁰ 2000/2231(INI),

<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2000/2231%28INI%29>

2005,⁷¹ four Thematic Comments, including one on the ‘Balance between Security and Freedom in the European Union’,⁷² and 15 Opinions,⁷³ including reports on the ‘Requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists’,⁷⁴ the ‘Human Rights Responsibilities of the EU Member States in the context of the C.I.A. Activities in Europe (‘Extraordinary Renditions’),⁷⁵ and ‘Ethnic Profiling’,⁷⁶ which responded directly to an EU Recommendation on ‘terrorist profiling’.⁷⁷

While these reports were extremely detailed in their critique of the way specific EU measures impacted on the fundamental rights of citizens, on the relevance of national and European court rulings to EU counter-terrorism policy, and on recommendations to ensure EU legislation complied with the EU Charter of Fundamental Rights, there was no meaningful consideration of their reports by either the Council of the EU or the European Commission, nor any attempt to act upon their findings. Instead, in 2006 the Network was disbanded to make way for the Fundamental Rights Agency, which was denied any competence at all in regard to EU JHA policy. As the authors stated in their final report:

“[T]he Network regrets that neither the Commission, nor the Parliament, have fully realized the potential of the Network. In order to genuinely pursue policies aimed at the realization of fundamental rights, more is required than to set up a network of independent experts and receive its reports, and then refer to such reports on a purely *ad hoc* basis, in a way which external observers could perceive as being purely selective. Such reports should be analyzed and followed upon. Answers should be provided to the questions raised in those reports. Whether or not they are acted upon, the recommendations made at least should be examined by the competent services...

The Network expresses the hope that, in the future, lessons will be drawn from this experiment. In particular, it would emphasize that independency and legal expertise, rather than being ends in themselves, should be seen as means - albeit indispensable ones - of developing a fundamental rights policy; their potential will only be realised if, on the part of the institutions, there exists a genuine commitment to act on the basis of the opinions and recommendations adopted by any independent body set up in order to monitor the situation of fundamental rights. It is clear that neither the Network of Independent Experts on Fundamental Rights, nor - in the future - the Fundamental Rights Agency, may be recognized any power to adopt binding opinions or recommendations. These are purely advisory bodies. Nevertheless, more could be done in order to ensure that these opinions and recommendations effectively contribute to the grounding in fundamental rights of Union policies are legislation.⁷⁸

⁷¹ CFR-CDF, Report on the situation of fundamental rights in the European Union and its Member States in 2002, http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_2002_report_en.pdf; 2003, <http://www.statewatch.org/news/2004/may/indexperts-report-2003.pdf>; 2004, <http://www.statewatch.org/news/2005/jul/net-ind-experts-report-2004.pdf>; 2005, <http://www.statewatch.org/news/2006/jun/EU-funrights-report05.pdf>

⁷² CFR-CDF, ‘The balance between freedom and security in the response by the European Union and its member states to the terrorist threats’, March 31 2003, http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_themcomment1_en.pdf

⁷³ The majority of the network’s reports are available on the European Commission’s website: European Commission, ‘Fundamental rights’, <http://ec.europa.eu/justice/fundamental-rights/document/>

⁷⁴ CFR-CDF, ‘The requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists – Opinion no 3-2005’, 23 August 2005, http://www.fd.uc.pt/hrc/pdf/eu_fund_rights/CFR-CDF_Avis3-2005.pdf

⁷⁵ CFR-CDF, ‘The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe (‘extraordinary renditions’), 25 May 2005, http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion3_2006_en.pdf

⁷⁶ CFR-CDF, ‘Ethnic profiling’, December 2006, http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion4_2006_en.pdf

⁷⁷ Draft Council Recommendation on the development of terrorist profiles, 11858/3/02 REV 3, 18 November 2002, <http://register.consilium.europa.eu/pdf/en/02/st11/st11858-re03.en02.pdf>

⁷⁸ CFR-CDF, ‘Report on the situation of fundamental rights in the European Union and its member states in 2005: conclusions and recommendations’, pp.23-24, <http://criidho.uclouvain.be/documents/Download.Rep/Reports2005/CFR-CDFConclusions2006EN.pdf>

3.4.3 The EU Counter-Terrorism Coordinator

The role of EU Counter-Terrorism Coordinator (CTC) was established by the European Council in its March 2004 Declaration on Combating Terrorism.⁷⁹ Emphasising that “a comprehensive and strongly coordinated approach is required in response to the threat posed by terrorism,” the European Council agreed to the creation of the post within the Secretariat of the Council of the European Union, with the main responsibility of maintaining “an overview of all the instruments at the Union’s disposal with a view to regular reporting to the Council and effective follow-up of Council decisions.” The CTC’s webpage further notes that he should also “closely monitor the implementation of the EU counter-terrorism strategy, fostering better communication between the EU and third countries and ensure that the Union plays an active role in the fight against terrorism.”⁸⁰ The first Coordinator, appointed by Javier Solana as Secretary-General/High Representative, was Gijs de Vries,⁸¹ followed in 2007 by Gilles de Kerchove who remains in the post to the present day.

While the CTC has issued fairly regular reports on the ‘state of play’ with regard to the legislation, policies and activities established through the EU’s counter-terrorism strategies and action plans,⁸² these publications shed no light on the legitimacy or effectiveness of the EU’s myriad counter-terrorism measures. A 2007 report examining the implementation of the EU strategy for combating radicalisation and recruitment, for example, made no mention of issues relating to legitimacy or effectiveness, nor any reference to fundamental rights (despite the aforementioned 2005 Opinion of the EU’s fundamental rights experts).⁸³ The accompanying discussion paper took a similar approach, concerning itself largely with how EU institutions and Member States could more rapidly implement various policies and measures. This contained a single reference to fundamental rights in a section on data-sharing with third countries which noted that “care must be taken to ensure that personal data transferred to third countries are sufficiently protected and are not used for unacceptable purposes or procedures”.⁸⁴

In December 2011 the CTC issued a paper reporting on the implementation of the EU Action Plan on combating terrorism. He noted that he would not “repeat the findings of the Commission’s implementation report [December 2010, discussed below], but would update the reporting on the implementation of the overall counter-terrorism strategy in the last 12 months.” In fact, the report did cover the same ground as the Commission’s and did not substantially consider the implications of the EU’s counter-terrorism strategy for fundamental rights and democratic control, despite the by then extensive critique of civil society organisations, lawyers, journalists and even governments.⁸⁵ This may be attributable to the fact that the CTC’s mandate does not include any obligation to assess the legitimacy and effectiveness of EU counter-terrorism measures (or to undertake any similar tasks).

3.4.4 The 2010 review of EU counter-terrorism policy

In July 2010 the European Commission published a Communication entitled ‘The EU Counter-Terrorism Policy: main achievements and future challenges’. The aim of the report was to “take stock of the main legislative and policy achievements at the EU level in the fight against terrorism,

⁷⁹ Council of the European Union, ‘Declaration on combating terrorism’, 7906/04, 29 March 2004, <http://register.consilium.europa.eu/pdf/en/04/st07/st07906.en04.pdf>

⁸⁰ Council of the European Union, ‘EU Counter-terrorism Coordinator’, <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator?lang=en>

⁸¹ Press release, ‘Javier SOLANA, EU High Representative for the CFSP, appoints Mr Gilles de KERCHOVE as EU Counter-Terrorism Coordinator’, 19 September 2007, https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/95988.pdf

⁸² EU Counter-Terrorism Coordinator, ‘Reports’, <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator/reports?lang=en>

⁸³ EU Counter-Terrorism Coordinator, ‘The EU Strategy for Combating Radicalisation and Recruitment – Implementation report’, 15443/07, 23 November 2007, <http://register.consilium.europa.eu/pdf/en/07/st15/st15443.en07.pdf>

⁸⁴ EU Counter-Terrorism Coordinator, ‘Implementation of the EU Counter-terrorism strategy – Discussion paper’, 15448/07, 23 November 2007, p.6 <http://register.consilium.europa.eu/pdf/en/07/st15/st15448.en07.pdf>

⁸⁵ International Commission of Jurists, ‘Assessing Damage, Urging Action, Report of the eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights’, 16 February 2009, http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf

and to outline some future challenges in this field”.⁸⁶ The report contained a section on each of the EU Counter-Terrorism Strategy’s four themes – prevent, protection, pursue and respond – and the Commission noted that “some major achievements have been highlighted and future challenges identified.” The Communication is a wide-ranging, but largely descriptive, report, that essentially lists measures already introduced and those which the Commission feels need improving or updating.

A section entitled ‘Respect for fundamental rights’ takes up the issue of the compatibility of EU counter-terrorism measures with regard to fundamental rights standards, but does not do so in any great depth. There are general statements such as “respect for fundamental rights and the rule of law is at the heart of the EU’s approach to countering terrorism” and “the Commission is therefore dedicated to ensuring that all tools that are deployed in the fight against terrorism fully respect fundamental rights”, and reference to a 2009 Commission report that synthesised member states’ responses to a Commission questionnaire on “criminal law, administrative law/procedural law and fundamental rights in the fight against terrorism”. However, neither this nor any further issues are examined in any depth. Despite the claim that “the priority will be to ensure that any EU legislation and actions in this area fully complies with the Charter of Fundamental Rights, including implementing legislation put in place by the member states,” there is no suggestion as to how this will be done, nor any reflection on whether this was the case up to the time the Commission Communication was written.

The shortcomings in the Commission’s report were seized upon by the European Parliament in a report published in July 2011, which noted that “remarkably little has been done to assess to what degree EU counter-terrorism policies have achieved the stated objectives” despite Parliament “repeatedly call[ing] for a thorough evaluation of EU counter-terrorism policies, as evaluation and assessment... preconditions for the transparency and accountability of policy-makers.” The European Parliament stated that:

“[A] proper evaluation of ten years of counter-terrorism policies should focus on examining whether the measures taken to prevent and combat terrorism in the EU have been evidence-based (and not based on assumptions), needs-driven, coherent and part of a comprehensive EU counter-terrorism strategy, based on an in-depth and complete appraisal, to be carried out in line with Article 70 of the TFEU, with the Commission reporting back to a Joint Parliamentary Meeting of the EP and national parliamentary committees responsible for overseeing counter-terrorism activities within six months of the study being commissioned, drawing upon reports to be requested from relevant organisations and agencies such as Europol, Eurojust, the Fundamental Rights Agency, the European Data Protection Supervisor, the Council of Europe and the United Nations.”⁸⁷

The Parliament called for the Commission to produce “a full and detailed evaluation” that included “at least the following items”:

- i. A clear analysis of the response to the terrorist threat, based on the definition laid down in Council Framework Decision 2002/475/JHA on combating terrorism as well as the framework of counter-terrorism measures to address this threat in terms of effectiveness, gaps in security, prevention, prosecution and increased security in Europe, including the effectiveness of the EU agencies and the proportionality thereof;
- ii. Facts, figures and trends relating to terrorist activity and counter-terrorism activity;
- iii. A full overview of the accumulated impact of counter-terrorism measures on civil liberties and fundamental rights, measures by third countries with a direct impact in the EU and all measures taken in this field in connection with external relations, as well as the case law of the ECHR, the ECJ and national courts.

⁸⁶ European Commission, ‘The EU Counter-Terrorism Policy: main achievements and future challenges’, COM(2010) 386 final, 20 July 2010, http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/com_2010_386_en.pdf

⁸⁷ European Parliament, ‘EU counter-terrorism policy: main achievements and future challenges’, 2010/2311(INI), 14 December 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0577+0+DOC+PDF+V0//EN>

Further calls were made for analysis of “which measures have objectives other than counter-terrorism,” or where mission or function creep had taken place; “a complete and detailed map of all existing counter-terrorism policies in Europe, with a special focus on EU legislation, and how it has been transposed and implemented at EU level”; a “full and detailed report” on resources spent by the EU, member states and private companies on counter-terrorism; and a study to establish whether counter-terrorism policies are “subject to effective democratic scrutiny.”

The Commission did claim in its December 2010 Communication that it would “launch a study to make a more detailed evaluation of the current policies and priorities,” and that it “should be available in time for the mid-term evaluation of the Stockholm Programme”. The mid-term evaluation of the Stockholm Programme came and went, but the Commission’s “more detailed evaluation” of counter-terrorism policy is yet to appear. The Parliament’s call for an in-depth, comprehensive review of all aspects of EU counter-terrorism policy, including legitimacy and effectiveness, therefore remains no more than an aspiration – yet such an assessment, while daunting in scope, is still clearly necessary.

3.5 Conclusions

There appear to be ample mechanisms and there is certainly no shortage of expertise available to the EU to properly assess the impact, legitimacy and effectiveness of its counter-terrorism policies. But our research suggests that these resources are at best underutilised and at worst applied in a manner that ultimately ignores crucial issues of civil liberties and human rights, necessity and proportionality, accountability and democratic control. Such an approach is fundamentally at odds with the values espoused by the EU Treaties.

While our research has focused primarily on application of the mechanisms that might be used to assess legitimacy and effectiveness (rather than the substance of those assessments), the findings should be of particular concern to anyone concerned with the legitimacy and effectiveness of EU counter-terrorism policy. Four particular conclusions stand out and it is strongly recommended that they be subject to further consideration, research and assessment by the SECILE consortium.

First, it is clear that despite a decade-old commitment to “get more people and organisations involved in shaping and delivering EU policy”, it is the member states in the EU Council and the European Commission which – largely shielded from public view – have played the key role in both deciding and evaluating EU counter-terrorism policy. That the European Parliament was denied a meaningful role in the EU decision-making process with respect to three-quarters of the EU’s 88 legally binding counter-terrorism measures is grounds alone for strongly questioning the democratic legitimacy of this body of legislation. If non-binding measures are taken into account, over 90% of the EU’s counter-terrorism policy has been elaborated without any substantive input from the EP.

Second, the failure to include any provisions for review for one third of the legally binding measures is demonstrative of a lack of concern for understanding fully the impact and effectiveness of key counter-terrorism measures on the part of EU legislators. The subsequent failure to produce or publish a quarter of the reviews that were mandated by the legislation supports this hypothesis, as does the assumption that those reviews that have been conducted are overwhelmingly concerned with whether the member states have implemented the legislation, rather than containing empirical assessments of the impact of that legislation. It is difficult to avoid the conclusion, therefore, that the EU is more concerned with assessing the exercise of its authority than with evaluating its effectiveness in the context of counter-terrorism. The legitimacy of EU counter-terrorism policy is simply taken for granted by legislators while challenges to the EU’s legitimacy have consistently been met with the conviction that “more Europe” is the only solution.

Third, of all the evaluation processes at the EU’s disposal, much greater weight appears to have been ascribed to the needs and assessments of law enforcement and security agencies than the other “stakeholders” courted in debates about the “disconnect” between the EU and the citizen. The “mutual evaluations” of the member states’ counter-terrorism and crisis management capabilities and the creation of the post of EU Counter-Terrorism Coordinator have further attempted to impose uniformity amongst the structures of member states’ law enforcement and security forces and the implementation of EU law, while those bodies and organisations that have concerned themselves with questions of impact, legitimacy and effectiveness in any broader sense have been marginalised or ignored. The views of the European Parliament’s Civil Liberties Committee (outside of the co-decision procedure), the European Data Protection Supervisor, the EU Expert Network on Fundamental Rights and civil society organisations have had little discernible impact on specific measures (with a few notable exceptions) and less still on the overall trajectory of EU counter-terrorism policy. Given these trends, it must be asked whether the increased use of public consultation, impact assessment, advisory opinions and the EU’s other preferred mechanisms for assessing legitimacy genuinely offer the prospect of “better law-making”, as promised by the Commission, or whether novel and more robust procedures are required.

Finally, it must be observed that the “full and detailed evaluation” of EU counter-terrorism policy requested by the European Parliament in 2011 is long overdue. It is abundantly clear that the vast 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. Indeed, the fact that so much counter-terrorism legislation across Europe stems from the European Union coupled with the limited mechanisms for ensuring democratic accountability in decision-making, national transposition and *ex-post* review appears to have compounded the problems that have become synonymous with the protection of fundamental rights in this field. The research in this and the three other reports by *Statewatch* produced for the SECILE project strongly supports the European Parliament's call for "a proper evaluation of ten years of counter-terrorism policies [focused] on examining whether the measures taken to prevent and combat terrorism in the EU have been evidence-based (and not based on assumptions), needs-driven, coherent and part of a comprehensive EU counter-terrorism strategy, based on an in-depth and complete appraisal".

4. Overview of use of assessment mechanisms for EU CTMs

4.1 Agreements

AGREEMENTS	Pre-legislative mechanisms				Post-legislative mechanisms			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Agreement on mutual legal assistance between the European Union and the United States of America	No	No	2001/2633 (RSP)	No	Due January 2015	No provisions	No provisions	No provisions
Agreement on extradition between the European Union and the United States of America	No	No	2001/2633 (RSP)	No	Due January 2015	No provisions	No provisions	No provisions
Agreement between EC and USA on intensifying and broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation on container security and related matters	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Agreements between EC and USA on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection	No	No	B5-0164/2004 A5-0271/2004 9614/04 (EP announces intention to seek ECJ opinion) A7-0099/2012	EDPS opinion (2011)	Report on the joint review (2010)	No provisions	No provisions	No provisions
Agreement between EC and Canada on the processing of Advance Passenger Information and Passenger Name Record	No	No	A6-0226/2005 T6-0294/2005	Decision 2006/253/EC on the adequate protection of personal data EDPS	Joint review carried out in Nov 2008, not available	No provisions	No provisions	No provisions

data				opinion				
Agreement between EU and USA on the security of classified information	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Agreements between EU and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service	No	No	B6-0383/2008 A6-0403/2008 A7-0364/2011	EDPS opinion (2011)	Article 9 - cannot be located / never published Report on 2011 Agreement due a year after entry into force	No provisions	No provisions	No provisions
Agreement between EU and USA on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program	No	No	A7-0013/2010	EDPS opinion	2011 joint review 2012 joint review	No provisions	No provisions	No provisions

4.2 Common Positions

COMMON POSITIONS	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol	No	No	No	No	Article 4 - COM(2006) 167 final	No provisions	No provisions	No provisions

4.3 Decisions

DECISIONS	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions	No	No	A5-0180/2001	Economic and Social Committee opinion Committee of the Regions opinion	Article 10 - Report cannot be located	No provisions	No provisions	No provisions
Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime	No	No	A5-0398/2001	No	COM(2004) 457 final SEC(2004) 884	No provisions	Article 23 - Conducted regularly by the Joint Supervisory Board	No provisions
Council Decision 2002/996/JHA of 18 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism	No	No	A5-0305/2002	No	Article 10 - Measure does not appear to have been reviewed but reports based on mechanism established do not mention any problems.	No provisions	No provisions	No provisions
Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP	No	No	A5-0305/2002	No	No provisions	No provisions	No provisions	No provisions
Commission Decision 2004/388/EC of	No	No	No	No	No provisions	No provisions	No provisions	No provisions

29 April 2004 on an Intra-Community transfer of explosives document (C(2004) 1332								
Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism	No	No	A5-0436/2002	No	No provisions	No provisions	No provisions	No provisions
Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences	No	No	A6-0160/2005	No	No provisions	No provisions	No provisions	No provisions
Commission Decision 2006/25/EC of 23 December 2005 amending its internal rules of procedure	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Commission Decision 2006/299/EC of 19 April 2006 setting up a group of experts to provide policy advice to the Commission on fight violent radicalisation	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Commission Decision 2006/758/EC of 22 September 2006 on amending the SIRENE Manual	No	No	No	No	Article 22 - One report cannot be located, another due by 24 November 2013	Article 22 - So far not deemed necessary	No provisions	No provisions
Council Decision 2006/970/Euratom concerning the Seventh Framework Programme of the European Atomic Energy	No	SEC(2005) 430 SEC(2005) 431	A6-0203/2006	Committee of the Regions opinion Economic and Social Committee	COM(2009) 209 final SEC(2009) 589	No provisions	Article 6 - Expert panel interim report	Interim Evaluation – Report of the Expert Group

Community (Euratom) of 18 December 2006 for nuclear research and training activities (2007 to 2011)				e Opinion				
Council Decision 2006/971/EC of 19 December 2006 concerning the Specific Programme "Cooperation" implementing the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 to 2013)	No	COM(2005) 440 final	A6-0379/2006	No	COM(2009) 209 final SEC(2009) 589	No provisions	No provisions	Interim Evaluation – Report of the Expert Group
Council Decision 2007/124/EC, Euratom establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme 'Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks' ["CIPS" programme]	No	COM(2005) 124 final	A6-0390/2006 T6-0584/2006	No	COM(2011) 318 final	No provisions	No provisions	Article 14, reports cannot be located
Council Decision 2007/125/JHA establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme 'Prevention of and Fight against Crime' ["ISEC"]	No	COM(2005) 124 final	A6-0389/2006 T6-0596/2006	No	COM(2011) 318 final	No provisions	No provisions	Article 15, reports cannot be located

programme]								
Council Decision 2007/162 EC, Euratom of 5 March 2007 establishing a Civil Protection Financial Instrument	No	SEC(2005) 439	A6-0027/2006	No	Article 15 - COM(2011) 696	No provisions	No provisions	No provisions for review but Commission report apparently informed by a COWI (contractor) evaluation
Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)	No	No	A6-0353/2006	No	Article 66 - date not yet passed (three years after entry into operation of SIS II)	No provisions	No provisions	No provisions
Council Decision 2007/779/EC of 8 November 2007 establishing a Community Civil Protection Mechanism (recast)	No	SEC(2006) 113	A6-0268/2006	Economic and Social Committee opinion	Article 14 - Report cannot be located.	No provisions	No provisions	No provisions
Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime	No	No	A6-0388/2006	No	Article 8 - COM(2011) 176 final	Cannot be located - on CATS agenda 16 May 2011	No provisions	No provisions
Council Decision 2008/615/JHA of 23 June 2008 Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [Prüm Decision]	No	No	A6-0207/2007	EDPS opinion	Article 36 - COM(2012) 732	No provisions	No provisions	No provisions

Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [Prüm Decision]	No	No	A6-0099/2008	EDPS opinion (own initiative)	No provisions	Article 21 - 5074/5/13 REV 5	No provisions	No provisions
Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations	No	No	A6-0507/2007	No	No provisions	No provisions	No provisions	No provisions
Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences	2004 - Consultation of Visa Information System (VIS)	No	A6-0195/2007	EDPS opinion	Article 17 - Due in October 2013	Article 17 - Due in October 2013	No provisions	No provisions
Commission Decision 2009/83/EC of 23 January 2009 Commission Decision amending Regulation (EC) No 725/2004 of the European Parliament and of the council as far as the IMO Unique Company and Registered Owner	No	No	No	No	No provisions	No provisions	No provisions	No provisions

Identification Number Scheme is concerned (notified under document number C(2009) 148) [related to Regulation (EC) No 725/2004]								
Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	No	No	A6-0360/2008	EDPS opinion	Article 7 - Report due at the latest by 27 April 2016	No provisions	No provisions	No provisions
Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol)	No	SEC(2006) 1682 SEC(2006) 1683 SEC(2007) 729	A6-0447/2007	EDPS opinion	No provisions	No provisions	Article 34 - Conducted regularly by the Joint Supervisory Board	Article 37 - RAND Europe report

4.4 Directives

DIRECTIVES	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Parliament and Council Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/E EC on prevention of the use of the financial system for the purpose of money laundering	No	Not publicly available	A5-0175/2000 A5-0090/2001 A5-0380/2001	Economic and Social Committee opinion	Review could not be located	No provisions	No provisions	No provisions
Parliament and Council Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the protection of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)	No	Not publicly available	A5-0270/2001 A5-0374/2001 A5-0130/2002	Economic and Social Committee opinion	Article 18 - COM(2006) 334 final	No provisions	No provisions	No provisions
Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims	No	No	A5-0330/2003	Economic and Social Committee opinion	Article 19 - COM(2009) 170 final SEC(2009) 495	No provisions	No provisions	No provisions
Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [API Directive]	No	No	A5-0211/2004 A5-0266/2004	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money	No	No	A6-0137/2005	European Central Bank opinion Economic and Social Committee opinion	SEC(2009) 939 final SEC(2011) 1178 final COM(2012) 168 final	No provisions	No provisions	No provisions

laundering and terrorist financing								
Parliament and Council Directive 2005/65/EC of 26 October 2005 on enhancing port security	No	No	A6-0031/2005	Economic and Social Committee opinion Committee of the Regions Economic and Social Committee opinion	COM(2009) 2 final	No provisions	No provisions	No provisions
Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC	No	SEC(2005)1131 final	A6-0365/2005	EDPS opinion Economic and Social Committee opinion	COM(2011) 225 final EDPS opinion on COM(2011) 225 Consultation on the Evaluation of the Application of the Data Retention Directive	No provisions	No provisions	No provisions
Parliament and Council Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC	No	SEC(2005)1535	A6-0298/2006	European Central Bank opinion Economic and Social Committee opinion	SEC(2011) 906 final SEC(2011) 907 final SEC(2011) 1178 final	No provisions	No provisions	Tipik Communication Agency
Commission Directive 2008/43/EC of 4 April 2008 setting up, pursuant to Council Directive 93/15/EEC, a system for the identification and traceability of explosives for civil uses	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Council Directive 2008/114/EC of 8	Green Paper on	SEC(2006	A6-0270/200	European Central	SWD(2012) 190	No	No	No

December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection	a European Programme for Critical Infrastructure Protection) 1654 SEC(2006) 1648	Z	Bank opinion	final	provisions	provisions	provisions
Parliament and Council Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control	No	SEC(2005) 1499 (French)	A6-0081/2007 A6-03358 A6-0099/2009	No	COM(2012) 660 final	No provisions	No provisions	No provisions
Parliament and Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings	No	SEC(2009) 915 SEC(2009) 916	A7-0198/2010	No	Article 10	No provisions	No provisions	No provisions
Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for protection, and for the content of the protection granted (recast)	No	SEC(2009) 1373 final SEC(2009) 1374 final	A7-0271/2011	No	Article 39	No provisions	No provisions	No provisions
Parliament and Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings	No	SEC(2010) 907 SEC(2010) 908	A7-0408/2011	No	Article 12	No provisions	No provisions	No provisions
Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the	No	SEC(2011) 580 final	A7-0244/2012	EDPS opinion	Article 29	No provisions	No provisions	No provisions

rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA								
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4.5 Framework Decisions

FRAMEWORK DECISIONS	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism	No	No	A5-0397/2001 A5-0003/2002	No	COM(2004) 409 final SEC(2004) 688 COM(2007) 681 final SEC(2007) 1463	No provisions	No provisions	No provisions
Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams	No	No	A5-0369/2001	No	COM(2004) 858 final	No provisions	No provisions	No provisions
Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States	No	No	A5-0397/2001 A5-0003/2002	No	COM(2005) 63 final SEC(2005) 267 COM(2006) 8 final SEC(2006) 79 COM(2007) 407 final SEC(2007) 979 final COM(2011) 175 final SEC(2011) 430 final	No provisions	No provisions	No provisions
Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence	No	No	A5-0274/2001 A5-0172/2001	No	COM(2008) 885 final	No provisions	No provisions	No provisions
Council Framework Decision 2005/212/JHA of 24 February 2005 on	No	No	A5-0383/2002	No	COM(2007) 805 final	No provisions	No provisions	No provisions

confiscation of crime-related proceeds, instrumentalities and property								
Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems	No	No	A5-0328/2002	No	COM(2008) 448 final	COM report basis for assessment, either unpublished or never completed	No provisions	No provisions
Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders	No	No	A5-0383/2002	No	COM(2010) 428 final	As above	No provisions	No provisions
Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union	No	No	A-0162/2005	No	SEC(2011) 593 final	13970/11	No provisions	No provisions
Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European	No	No	A6-0187/2006 A6-0362/2007	No	COM report due this year (p.14)	6345/3/12 REV 3	No provisions	No provisions

Union								
Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters	No	No	A5-0214/2004 A6-0408/2008	No	Unavailable/ Never been published	Two reports due in accordance with Articles 23 and 24, neither can be located	No provisions	No provisions
Council Framework Decision 2009/315/JHA of 25 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States	No	No	A6-0170/2007 A6-0207/2008	EDPS opinion	Report due by 27 April 2015	No provisions for review	No provisions	No provisions

4.6 Joint Actions

JOINT ACTIONS	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Joint Action 2007/501/CFSP of 16 July 2007 on cooperation with the African Centre for Study and Research on Terrorism in the framework of the implementation of the European Union counter-terrorism strategy	No	No	No	No	No provisions	Article 5 - reports not publicly available	No provisions	No provisions

4.7 Regulations

REGULATIONS	Pre-legislative measures				Post-legislative measures			
	Public consultation	Impact assessment	EP reports	Other reports	COM review	Council review	Expert review	Contractor review
Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism	No	No	No	No	Article 11 - report cannot be located	No provisions	No provisions	No provisions
Council Regulation (EC) No 334/2002 of 18 February 2002 laying down a uniform format for visas issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form	No	No	A5-0445/2001	No	No provisions	No provisions	No provisions	No provisions
Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial	No	No	No	No	No provisions	No provisions	No provisions	No provisions

resources in respect of the Taliban of Afghanistan								
Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals	No	No	A5-0445/2001	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 2320/2002 of 16 December 2002 establishing common rules in the field of civil aviation security	No	No	A5-0415/2001 A5-0134/2002 A5-0402/2002		COM(2005) 428 final COM(2007) 542 final COM(2008) 582 final COM(2009) 518 final COM(2010) 725 final	No provisions	No provisions	No provisions
European Parliament and Council Regulation (EC) No 2003/2003 of 13 October 2003 relating to fertilisers	No	No	A5-0107/2002 A5-0252/2003	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 725/2004 of 31 March 2004 on enhancing ship and port facility security	No	No	A5-0385/2003	Economic and Social Committee opinion	No provisions	No provisions	No provisions	No provisions
Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism	No	No	A5-0436/2002	No	No provisions	No provisions	No provisions	No provisions
Council Regulation (EC) No 2007/2004 of 26 October 2004	No	No	A5-0093/2004	Economic and Social Committee opinion	COM(2008) 67 final SEC(2008	No provisions	No provisions	Article 33 - COWI evaluation, January

establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) 148 SEC(2008) 149 EP response to Commission review			2009
Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States	No	No	A6-0028/2004	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 648/2005 of 13 April 2005 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code	No	No	A5-0255/2004 A6-0021/2005	Economic and Social Committee opinion	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfer of funds	No	No	A6-0196/2006	European Central Bank opinion Economic and Social Committee opinion	Article 19 but cannot be located/never published	No provisions	No provisions	No provisions
Commission Regulation amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code	No	No		No	No provisions	No provisions	No provisions	No provisions
Regulation (EC) No 863/2007 of 11 July 2007 establishing a	No	SEC(2006) 953 SEC(2006) 954	A6-0135/2007	No	COM(2008) 67 final (came out in year	No provisions	No provisions	No provisions

mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers		(French only)			after RABIT Regulation but does not examine it)			
Parliament and Council Regulation (EC) No 1987/2006 of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)	No	No	A6-0355/2006	No	Article 50(5) - due April 2016	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 300/2008 of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002	No	No	A6-0194/2006 A6-0134/2007 A6-0049/2008	Economic and Social Committee opinion	COM(2011) 649 final COM(2012) 412 final COM(2012) 523 final	No provisions	No provisions	No provisions
Commission Regulation (EC) No 324/2008 of 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security	No	No	No	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 767/2008 of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS	No	SEC(2004) 1628	A6-0194/2007	EDPS opinion	Article 50(3) - due 2014	No provisions	No provisions	No provisions

Regulation)								
Commission Regulation (EC) No 820/2008 of 8 August 2008 laying down measures for the implementation of the common basic standards on aviation security	No	No	?	No	No provisions	No provisions	No provisions	No provisions
Parliament and Council Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community code on Visas (Visa Code)	No	SEC(2006) 957 (French only) SEC(2006) 958 (unavailable)	A6-0161/2008	No	Article 57(1) - COM(2012) 648 final	No provisions	No provisions	No provisions
Parliament and Council Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union	No	SEC(2010) 149 SEC(2010) 150	A7-0278/2011	EDPS opinion Economic and Social Committee opinion	No provisions	No provisions	No provisions	Article 33(2) - next evaluation due 2014
Parliament and Council Regulation (EU) No 98/2013 of 15 January 2013 on the marketing and use of explosives precursors	No	SEC(2010) 1040 final SEC(2010) 1041 final	A7-0269/2012	EDPS opinion Economic and Social Committee	Article 18 - due by 2 September 2017	No provisions	No provisions	No provisions
Parliament and Council Regulation (EU) No 100/2013 of 15 January 2013 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency	No	SEC(2010) 1263 final SEC(2010) 1264 final	A7-0372/2011 A7-0387/2012	Economic and Social Committee	Article 22 - progress report due by 2 March 2018	No provisions	No provisions	Article 22 - External evaluation due every five years

Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1993/2011	No	No	No	No	Mentioned only in preamble	No provisions	No provisions	No provisions
Parliament and Council Regulation (EU) No 523/2013 of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004	No	SEC(2010) 1126 SEC(2010) 1127	A7-0056/2013	EDPS opinion Economic and Social Committee opinion	Article 32 - due by 20 June 2018	No provisions	No provisions	No provisions

5. Court cases

5.1 Agreements

Legislation	
Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 20 May 2004	
Cases	
C-317/04 and C-318/04	Joined Cases C-317/04 and C-318/04, European Parliament v Council and Commission

5.2 Common Positions

Legislation	
Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism	
Cases	
T-341/07	Judgment of the General Court of 23 November 2011 – Sison v Council
T-348/07	Judgment of the General Court of 9 September 2010 – Al-Aqsa v Council
C-402/05 P and C-415/05 P	Judgment of the Court (Grand Chamber) of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat v Council
C-539/10 P and C-550/10 P	Judgment of the Court (Third Chamber) of 15 November 2012 in Joined Cases C-539/10 P and C-550/10 P, Al-Aqsa v Council and Netherlands v Al-Aqsa
C-584/10 P, C-593/10 P and C-595/10 P	Judgment of the Court (Grand Chamber) of 18 July 2013 in Joined Cases C-584/10, C-593/10 and C-595/10 P, Commission, UK v Kadi
References for preliminary rulings	
DE (C-57/09 and C-101/09)	Judgment of the Court (Grand Chamber) of 9 November 2010, Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)
DE (C-550/09)	Judgment of the Court (Grand Chamber) of 29 June 2010, Oberlandesgericht Düsseldorf (Germany) v E and F
FR (C-27/09 P)	Judgment of the Court (Grand Chamber) of 21 December 2011, French Republic v People's Mojahedin Organisation of Iran, Council and Commission

5.3 Directives

Legislation	
Parliament and Council Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the protection of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)	
References for preliminary rulings	
AT (C-557/07)	Order of the Court (Eighth Chamber) of 19 February 2009, LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH
BE (C-70/10)	Judgment of the Court (Third Chamber) of 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)
DE (C-119/12)	Judgment of the Court (Third Chamber) of 22 November 2012, Josef Probst v mr.nexnet GmbH
DE (C-543/09)	Judgment of the Court (Third Chamber) of 5 May 2011, Deutsche Telekom AG v Bundesrepublik Deutschland
ES (C-275/06)	Judgment of the Court (Grand Chamber) of 29 January 2008, Productores de Música de España (Promusicae) v Telefónica de España SAU
SE (C-461/10)	Judgment of the Court (Third Chamber) of 19 April 2012, Bonnier Audio AB and Others v Perfect Communication Sweden AB

Legislation	
Parliament and Council Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the protection of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)	
References for preliminary rulings	
AT (C-557/07)	Order of the Court (Eighth Chamber) of 19 February 2009, LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH.
BE (C-70/10)	Judgment of the Court (Third Chamber) of 24 November 2011, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)
DE (C-119/12)	Judgment of the Court (Third Chamber) of 22 November 2012, Josef Probst v mr.nexnet GmbH
DE (C-543/09)	Judgment of the Court (Third Chamber) of 5 May 2011, Deutsche Telekom AG v Bundesrepublik Deutschland
ES (C-275/06)	Judgment of the Court (Grand Chamber) of 29 January 2008, Productores de Música de España (Promusicae) v Telefónica de

	España SAU
SE (C-461/10)	Judgment of the Court (Third Chamber) of 19 April 2012, Bonnier Audio AB and Others v Perfect Communication Sweden AB

Legislation	
Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims	
References for preliminary rulings	
IT (C-122/13)	Request for a preliminary ruling from the Tribunale Ordinario di Firenze (Italy) lodged on 15 March 2013 — Paola C. v Presidenza del Consiglio dei Ministri
IT (C-79/11)	Case C-79/11: Reference for a preliminary ruling from the Tribunale Ordinario di Firenze (Italy), lodged on 22 February 2011 — Criminal proceedings against Maurizio Giovanardi and Others
Legislation	
Parliament and Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing	
References for preliminary rulings	
ES (C-212/11)	Judgment of the Court (Third Chamber) of 25 April 2013, Jyske Bank Gibraltar Ltd v Administración del Estado

Legislation	
Parliament and Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC	
References for preliminary rulings	
AT (C-594/12)	Request for a preliminary ruling from the Verfassungsgerichtshof (Austria) lodged on 19 December 2012 — Kärntner Landesregierung and Others
AT (C-46/13)	Request for a preliminary ruling from the Datenschutzkommission (Austria) lodged on 28 January 2013 — H v E
IE (C-301/06)	Judgment of the Court (Grand Chamber) of 10 February 2009, Ireland v European Parliament, Council of the European Union
IE (C293/12)	Reference for a preliminary ruling from High Court of Ireland made on 11 June 2012, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General

SE (C-461/10)	Judgment of the Court (Third Chamber) of 19 April 2012, <i>Bonnier Audio AB and Others v Perfect Communication Sweden AB</i>
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Legislation	
Parliament and Council Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC	
References for preliminary rulings	
AT (C-616/11)	Reference for a preliminary ruling from the Oberster Gerichtshof (Austria), lodged on 30 November 2011, <i>T-Mobile Austria GmbH v Verein für Konsumenteninformation</i>

5.4 Framework Decisions

Legislation	
Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States	
References for preliminary rulings	
BE (C-303/05)	Judgment of the Court (Grand Chamber) of 3 May 2007, <i>Advocaten voor de Wereld VZW v Leden van de Ministerraad</i> .
BE (C-306/09)	Judgment of the Court (Fourth Chamber) of 21 October 2010, <i>I.B.</i>
DE (C-66/08)	Judgment of the Court (Grand Chamber) of 17 July 2008 (reference for a preliminary ruling from the Oberlandesgericht Stuttgart — Germany)
DE (C-261/09)	Judgment of the Court (Grand Chamber) of 16 November 2010, <i>Gaetano Mantello</i> .
ES (C-399/11)	Judgment of the Court (Grand Chamber) of 26 February 2013, <i>Stefano Melloni v Ministerio Fiscal</i> .
FI (C-192/12)	Judgment of the Court (Second Chamber) of 28 June 2012, <i>Melvin West</i> .
FI (C-388/08)	Judgment of the Court (Third Chamber) of 1 December 2008, <i>Criminal proceedings against Artur Leymann et Aleksei Pustovarov</i> .
FR (C-168/13)	Judgment of the Court (Second Chamber) of 30 May 2013, <i>Jeremy F. v Premier ministre</i> .
FR (C-42/11)	Judgment of the Court (Grand Chamber) of 5 September 2012, <i>Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge</i> .

FR (C-296/08)	Judgment of the Court (Third Chamber) of 12 August 2008, Extradition proceedings against Ignacio Pedro Santesteban Goicoechea.
NL (C-123/08)	Judgment of the Court (Grand Chamber) of 6 October 2009 (reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands))
RO (C-396/11)	Judgment of the Court (Grand Chamber) of 29 January 2013, Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu.

5.5 Regulations

Legislation	
Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism	
Cases	
T-409/08	Action brought on 24 September 2008 — El Fatmi v Council
T-503/11	Action brought on 27 September 2011 — Al-Aqsa v Council
T-508/11	Action brought on 27 September 2011 — LTTE v Council
References for preliminary rulings	
DE (C-550/09)	Judgment of the Court (Grand Chamber) of 29 June 2010 (reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany)) — Criminal proceedings against E, F

Legislation	
Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan	
Cases	
T-306/01	Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities
T-315/01	Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities
T-253/02	Judgment of the Court of First Instance (Second Chamber) of 12

	July 2006, Chafiq Ayadi v Council of the European Union
T-49/04	Judgment of the Court of First Instance (Second Chamber) of 12 July 2006, Faraj Hassan v Council of the European Union and Commission of the European Communities
C-402/05 P and C-415/05 P	Judgment of the Court (Grand Chamber) of 3 September 2008 — Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland
C-399/06 P and C-403/06 P	Judgment of the Court (Fourth Chamber) of 3 December 2009. Faraj Hassan v Council of the European Union and European Commission (C-399/06 P) and Chafiq Ayadi v Council of the European Union (C-403/06 P)
T-135, 136, 137, 138/06	Judgment of the General Court of 29 September 2010 — Al-Faqih v Council
T-127/09	Action brought on 15 April 2009 — Abdulrahim v Council and Commission
T-322/09	Action brought on 14 August 2009 — Al-Faqih and MIRA v Council and Commission
T-318/01	Judgment of the Court of First Instance of 11 June 2009 — Othman v Council and Commission
References for preliminary rulings	
UK (C-340/08, Queen, M and Others v HM Treasury)	Judgment of the Court (Fourth Chamber) of 29 April 2010 (reference for a preliminary ruling from the House of Lords — United Kingdom) — The Queen, M and Others v Her Majesty's Treasury
Legislation	
<u>Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States</u>	
References for preliminary rulings	
DE (C-291/12)	Reference for a preliminary ruling from the Verwaltungsgericht Gelsenkirchen (Germany) lodged on 12 June 2012 — Michael Schwarz v Stadt Bochum
DE (C-101/13)	Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg (Germany) lodged on 28 February 2013 — U v Stadt Karlsruhe
NL (C-446/12)	Reference for a preliminary ruling from the Raad van State (Netherlands), lodged on 3 October 2012 — W.P. Willems; other party: Burgemeester van Nuth
NL (C-447/12)	Reference for a preliminary ruling from the Raad van State (Netherlands), lodged on 5 October 2012 — H.J. Kooistra; other

	party: Burgemeester van Skarsterlân
NL (C-448/12)	Reference for a preliminary ruling from the Raad van State (Netherlands), lodged on 8 October 2012 — M. Roest; other party: Burgemeester van Amsterdam
NL (C-449/12)	Reference for a preliminary ruling from the Raad van State (Netherlands), lodged on 8 October 2012 — L.J.A. van Luijk; other party: Burgemeester van Den Haag

Legislation	
<u>Parliament and Council Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community code on Visas (Visa Code)</u>	
References for preliminary rulings	
DE (C-39/12)	Reference for a preliminary ruling from the Bundesgerichtshof (Germany), lodged on 27 January 2012 — Criminal proceedings against Vu Thang Dang
DE (C-83/12)	Judgment of the Court (Second Chamber) of 10 April 2012, Criminal proceedings against Minh Khoa Vo
DE (C-84/12)	Reference for a preliminary ruling from the Verwaltungsgericht Berlin (Germany) lodged on 17 February 2012 — Ezatollah Rahmanian Koushkaki v Federal Republic of Germany
LV (C-575/12)	Request for a preliminary ruling from the Administratīvā apgabaltiesa (Latvia) lodged on 7 December 2012 — AS 'Air Baltic Corporation' v Valsts robežsardze