

SECILE

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

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

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

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EXECUTIVE SUMMARY

Insufficient consideration is currently given to the question of democratic legitimacy in the discussion, adoption and implementation of EU counter-terrorist (CT) measures. The questions of legitimacy, effectiveness and impact of counter-terrorism cannot be divorced from each other. The report considers and outlines the understandings of the impact, legitimacy and effectiveness of counter-terrorist measures in democratic theory and in the practice of democratic institutions within the EU and the member states. It is argued that in some respects the legitimacy and impact of CT measures on the democratic principles and system of the EU may be similar to other policy areas, and in other respects they may be unique. The transnational character of the terrorist threat and the absence of clear definitions help to legitimize recourse to expert knowledge, for trans-national responses and trans-boundary network governance, and for secrecy and emergency measures. These modes of governance help to position CT measures beyond the reach of democratic accountability mechanisms and sever the link between these measures and the authorization given by citizens. Thus the principle of autonomy, which is often seen as the core principle of democratic systems, no longer holds. Section 2 of the report provides an outline of different understandings of legitimacy, democracy and rights and looks at the issues of 'democratic deficit' and the democratic legitimacy of EU security policies. Section 3 draws on the concepts introduced in Section 2 to provide a review of the debates on the legitimacy, effectiveness and impact of counterterrorism law in the EU and to identify key arguments and contrasting positions. The report concludes that at the EU level the key challenge for CT policies is developing a critical public discourse and understanding of what and who it is that the EU's CT measures are meant to protect and how to make these measures subject to normal democratic controls.

1. Introduction

The EU has responded to the events of 9/11 and subsequent Madrid and London attacks with an extraordinary series of instruments aimed at securing Europe against the threat of terrorism. These included the creation of terrorism-related criminal offences, the extension of the powers of law enforcement agencies, special procedures for the prosecution of terrorism-related offences, exceptional forms of detention, facilitation and enforcement of information and intelligence exchange among law enforcement agencies. All this suggests that the EU is emerging, or is attempting to become, an increasingly influential security actor both in Europe and beyond.

The increasing prominence of normatively sensitive and politically controversial security measures such as the European Arrest Warrant, Asset Freezing Sanctions and border control measures on the EU agenda, and the scope and potential implications of such measures for democracy and human rights in Europe requires a careful evaluation of their impact. Many scholars of the EU have raised concerns about the increasing coordination between various actors involved in the governance of security and about the blurring of legal, policy and institutional boundaries between CT-related policy areas. Questions have been raised about the democratic legitimacy, accountability and oversight as well as the impact of these measures, the role of experts and expertise, the power of executives and the opacity of policy networks.

Whether the EU and its counter-terrorism measures suffer from a democratic deficit is not an entirely non-contentious question. The answer to this question depend on how democracy is understood: what are the core democratic principles and values of the EU polity and how are these principles and values embodied in the multi-level system of European governance? Democratic legitimacy of European CT measures has been understood in terms of output legitimacy, or effective protection of EU citizens against terrorism, and input legitimacy, or equal participation of all citizens in the making of these decisions. The picture is complicated by the presence of multiple understandings of democracy on the European level, by the debate about the relative importance of input and output legitimacy, and about the relative importance of national, intergovernmental and supranational bodies and levels of decision making in ensuring the democratic legitimacy of European policymaking.

A systematic analysis and understanding of the effectiveness, legitimacy and impact of CT law from a democratic perspective is currently underdeveloped and there remain gaps in knowledge and understanding. It is important to have a clearer picture of whether CT policies are appropriate and effective, how they impact on the democratic principles of the EU, its governance and citizenry, and perhaps most importantly whether the authorship of these decisions can be traced back to the EU citizens. The present report purports to contribute to the development of such an understanding.

In Section 2, the report provides a map of ideas and concepts that shape the debate about democratic legitimacy of counter-terrorism. It also provides a brief overview of the democratic deficit debate, followed by an outline of arguments in relation to the democratic legitimacy of the EU security policies.

In Section 3, the report focuses more directly on counter-terrorism, looking at the legitimacy, effectiveness and impact of counter-terrorism law.

2. The legitimacy, effectiveness and impact of EU decisions from democratic theory and practice

This section will identify and outline the key concepts and ideas with regards to legitimacy, effectiveness and impact from democratic theory and will consider how different conceptions of democracy highlight different aspects of democratic legitimacy. Second, it will review a debate on the relationship between the EU polity and democracy and the question of democratic deficit. Finally, this section will consider arguments regarding democratic legitimacy of EU security policies.

2.1 What is democratic legitimacy? Different understandings of legitimacy and democracy

In order to consider and outline understandings of the legitimacy, effectiveness and impact of counter-terrorist measures in democratic theory and practice, it is necessary first to identify the basic ideas and arguments that underpin the debate. Ulrich Haltern notes that ‘universal constitutionalism rests on two familiar and intertwined discourses, a doctrine of rights and a theory of political legitimacy’ (Haltern, 2007 p.47). The two discourses – the discourse on legitimate political authority and the discourse on human rights – figure prominently in the debate about democratic legitimacy of the EU and its law. At the heart of the debate are questions of the central principles and values of democracy and the appropriate and effective ways to protect these values and principles.

What makes a political authority legitimate and how is legitimacy related to democracy? The relationship is not straightforward: while it is important for democracies to have or be seen to have legitimacy, a government does not need to be democratic to be legitimate. Generally legitimacy can be described as people’s acceptance of an authority’s right to rule. For Thomas Hobbes (1996), legitimacy derived from the ability of a centralized political authority to guarantee individual and collective security. A monopoly over the legitimate use of force is contrasted in this view with the anarchic relations among states where a common source of legitimacy is absent. In contrast, for John Locke (1967), legitimacy derives from the consent of the governed. This illustrates contrasting interpretations of the sources of legitimacy in 17th century western political thinking. Yet another interpretation is provided by John Rawls (1993 p.137) for whom the exercise of political power in a democracy is legitimate ‘only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason’. Public reasoning is thus the basis of legitimacy for the liberal state. The idea of political legitimacy is further enriched by the notion of democratic public participation that can be traced back to thinkers such as John Stuart Mill and Alexis de Tocqueville who also warned against *the tyranny of the majority*. In the words of John Stuart Mill (1859 p.12): ‘the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power.’

These ideas regarding the justification of authority, political obligation and rights are reflected in contemporary democratic thinking and give rise to different conceptions of democracy: liberal democrats prioritise judicial review, checks and balances, separation of powers, voting systems (with an emphasis on protection of individual rights), participative democracy advocates place stronger emphasis on political participation, while the supporters of deliberative democracy emphasize the protection of public sphere and deliberative processes. Kohler-Koch and Rittberger (2007 p.17) further distinguish between rationalism and social constructivism in political thinking; these two strands of thought establish different criteria for the legitimacy of political decisions: while the former focuses on distributive and efficiency effects of voting and bargaining the latter prioritizes the aim of reaching common understanding. The question of impact of democratic decisions on individual rights will depend on a perspective. For example, del Sarto (2006 p.511) notes that ‘...democratic systems may comprise issue areas or policies for which the usual rules of democracy do not, or not fully, apply. An example here is the protection of human rights, which is generally entrusted to the constitution and the judiciary; minorities’ rights in particular tend to be subtracted from ‘normal’ democratic procedures.’ The key question is whether those affected are included and can influence the decisions (see von-Bogdandy 2007 p.40) even if in practice, it is ‘impossible to include all affected’ (Eriksen 2007 p.307).

Despite the differences in interpretations, there is a broad agreement among scholars about the fundamental democratic principle of *autonomy*. Autonomy is understood to be linked to self-determination. It is ‘the basic democratic principle that those affected by laws should also be authorized to make them’ (Eriksen 2011 p. 1174). It is the notion that for people to develop as free and equal they have to be autonomous (see Kohler-Koch and Rittberger 2007 p.12). Autonomy and accountability are ‘the basic

normative standards with regard to which political orders can claim legitimacy' (Eriksen 2011 p. 1174). Accountability 'designates a relationship in which the decision-makers can be held responsible to the citizenry...The 'rock bottom' of accountability is an obligation to provide good arguments for one's judgments, decisions and actions to the public. (Eriksen 2011 p.1174-5). However, the ways in which different aspects of democratic legitimacy – *input, output and social legitimacy* – are linked up with the principle of autonomy, or, the ways in which citizens' status as authors of policies is ensured, are not predetermined (Koch and Rittberger 2007 p.13). This means that the ways in which specific decision making procedures embody the principle of autonomy require further clarification.

How are democratic principles related to the idea of security? Kantner and Liberatory (2006 p.365) outline the ways in which contemporary thinking about security and democracy is shaped by two Western philosophical and political traditions: a state-centered and a liberal tradition. They trace the idea of security back to Leviathan and the need to use coercive means in order to provide collective and individual security. A neo-Hobbesian trend is evident, they argue, in both internal and external aspects of EU policies. It is evident in the ways in which infringements of human rights are justified by the need to provide security or in the by-passing of democratic procedures in home affairs, as well as in the prioritization of security and territorial integrity and reliance on pre-emptive action in international relations. On the other hand, contemporary critical assessment of the EU's security policies is underpinned by classical liberal ideas such as the importance of independent judges, liberal laws and checks and balances to guarantee citizen protection against abuses of power by the state. In this tradition, both the rulers and the ruled are equally subject to the rule of law. This implies a different perspective on security: the protection of fundamental rights and liberties is more important than the achievement of total security. This principle would guide the assessment of security policies in terms of their impact on fundamental rights and civil liberties and respect of minority rights; in international relations they would also aim at establishing effective legal safeguards protecting individuals from state oppression.

This implies two different perspectives on the legitimacy of counter-terrorist measures: one, drawing on Hobbes and realist thinking, considers a state's security measures to be legitimate when they can be seen to be effective in providing individual and collective security to the citizens of the state. Effectiveness, or 'output legitimacy', understood in terms of the achievement of security, is the ultimate criterion of the legitimacy of decisions. From a liberal perspective, the assessment of legitimacy of security policies will depend on the impact of the policies on fundamental rights and civil liberties in both domestic and external policies. From the liberal perspective the presence of effective legal, procedural and institutional safeguards protecting rights and liberties is a key criterion in the evaluation of legitimacy of security policies.

However, the application of the concepts of democratic legitimacy, effectiveness and impact to the EU polity represents additional challenges, as it involves questions about the nature of the EU as a polity and its relationship with nation-states. The key question is whether the EU represents a realm of intergovernmentalism which means that the power of decision making remains in the hands of nation-states or, whether it is a supranational polity to which nation states transfer some of their sovereignty. This has implications in terms of how the principles of democracy and legitimacy are to be understood at the EU level. Who is the legitimate provider of security and the guarantor of human rights (Kantner and Liberatory 2006)?

It has been argued that one cannot simply apply a state-centered understanding of democracy to the EU polity. For example, von Bogdandy argues that 'it is beyond question that the principle of democracy requires a specific concretization for the European Union and...any analogy to nation-state institutions must be carefully argued' (Von Bogdandy, 2007 p.35). To what extent/when can states collectively share sovereignty over aspects of decision making? How can security decisions be legitimate and effective and respect the fundamental rights and freedoms of EU citizens? While some scholars maintain that the EU remains essentially a regulatory tool in the hands of nation-states, some have argued that the EU has made

an effort to move beyond intergovernmentalism and ‘to define European interests, as well as European values’ (Sjursen 2011a p.1088).

This also raises further questions regarding the relationship between democracy and human rights at an international or supranational level. Whether civil rights apply to all of the world’s citizens or only residents of a particular state or a group of states, depends on whether one adopts a cosmopolitan or a nationalist perspective (Van Riezen and Roex 2011 p.100). A global perspective on democracy refers to ‘a global citizen’ (Hudson 2009). Hudson, drawing on Kant’s idea of cosmopolitanism and Habermas’s idea of ‘the public sphere’ argues that ‘justice in a time of terror ... calls for us to develop a more fluid sense of self, going beyond nationality and ethnicity to recognize being human as our first and most basic identity. It needs us to develop a ‘planetary humanism’, as Gilroy terms it, or a ‘grand universalism’, in Amartya Sen’s terms’ (Hudson, 2009 p.715). This would imply that ‘the subject of rights moved from the citizen to the human being’ (Bigo et al 2006 p.23). However, Sjursen (2011b) asks whether global rights are necessarily democratic and argues that there is a tension between the ideas of global rights and the principles of democracy.

The question of the protection of fundamental rights and civil liberties is especially pertinent in light of the recent institutional reforms introduced by the Lisbon Treaty (the Charter of Rights, enhanced powers of the European Parliament and the European Court of Justice and the EU accession to the ECHR). Will post-Lisbon EU institutions have a greater role in the protection of fundamental rights of EU citizens? While some argue that these provisions are ‘aimed at reinforcing democracy in its representative and participatory dimensions, by empowering the EP and by establishing the European citizens’ initiative arguably enabling citizens a greater control over EU decision-making’ (Mayoral 2011 p.1), others express concerns over the impact this will have on national constitutions and the role of the member states in the protection of citizens (Kruma 2010). Kruma anticipates that accession will further complicate the question of which public authority is in charge (2010). The Lisbon Treaty thus is far from resolving the issues of democratic legitimacy of the EU institutions; instead, it gives rise to further controversies around these issues.

2.2 The EU polity and democracy: does the EU have a ‘democratic deficit’?

Several unique features of the European Union are identified by the scholars of the EU; these lead some of them to argue that the EU suffers from a ‘democratic deficit’ while others argue that there is no democratic deficit. These arguments are outlined below.

The lack of a common citizenry and political identity

The EU is characterized by transnational/multinational citizenry (Kantner and Liberatory 2006) which means that democratic debate at the EU level is absent; there is no ‘common identity’ because of the lack of common memories, experience and communication (Kielmansegg 2003 in Kochler-Koch and Rittberger 2007 p.6-7). Folledal and Hix (2005 p.5) also argue that there are no truly ‘European’ elections and that ‘the EU is simply “too distant” from voters’, because first, electoral control over the EU institutions is too removed, and because psychologically it is too different from the domestic democratic institutions and citizens cannot understand it. This argument is supported by the Spring 2013 Euro-Barometer survey results; more than two-thirds of Europeans said that their voice does not count in the EU (67%), an upward trend from 53% in the spring of 2009. Similarly, Jolly (2007 p.61) argues that ‘at present there is no EU demos, that creating a demos based on a common cultural identity is neither possible nor desirable’ and therefore policy areas which require high levels of solidarity or a common identity should either remain fully within the nation states, or be subject to intergovernmental rather than supranational decision-making.

The complexity and underdevelopment of the institutional architecture of the EU

Scholars identify several features of the EU institutions that make the EU democratically deficient: these include the absence of vertical separation of powers – for example, the Commission combines executive, legislative and bureaucratic functions (Del Sarto 2006 p.512); an imbalance within the dual system of legitimacy (the Council and the EP) with relatively weak position of EP (Kohler-Koch and Rittberger 2007 p.7); ‘... an increase in executive power and a decrease in national parliamentary control’ (Andersen and Burns, 1996; Raunio, 1999 in Follesdal and Hix 2006 p.534); multi-level character of the EU decision-making system; the shift from hierarchy to networking and informality, or from government to governance undermines political equality and control (the combination of horizontal and vertical types of governance, the rise of expertocracy and new governance sites bypassing traditional channels of representation and accountability (Kohler-Koch and Rittberger 2007, p.10). The EU combines supranational, intergovernmental and federal traits (Del Sarto, 2006; Sjursen 2011a). Hence, some scholars argue that the EU is a new kind of political entity altogether, variously characterized as ‘post-modern’ or ‘non-state’ political entity, or as a ‘sui generis system of multilayered and polycentric governance’ (Del Sarto 2006 p.512). Sjursen (2011a p.1089) argues that ‘...we are some way towards the establishment of institutions devoted to the Union itself, rather than to the member states.’ A key challenge then is ‘who decides’ and who should be held accountable for decisions. Some scholars argue that ‘the European Union's (EU's) complex system of governance has been unable to achieve a democratic or constitutional legitimacy in its own right’ (Lindseth 2010).

While some see democratic deficit as a problem that cannot be resolved, others such as Fritz Scharpf argue that for the EU, one needs to focus on the problem-solving logics of institutional output. He argues that ‘what matters is the institutional capacity for effective problem-solving, and the presence of institutional safeguards against the abuse of public power’ (Scharpf, 1999, pp.187-8). Follesdal and Hix (2006) believe that the democratic potential of the EU can be realized via institutional reforms and societal practice. A democratic identity might form through a practice of democratic competition, for example, by enabling political competition for the most powerful executive position in the EU.

No democratic deficit. The EU as a regulatory body

According to this position, the EU decisions are ‘positive-sum’ and the only possible outcomes are those that leave everyone better off or at least not worse off than before (Marks et al. 1996; Joerges and Neyer 1997a, 1997b; Joerges and Vos 1999; Neyer 2003 cited in Eriksen 2011 p.1179). Giandomenico Majone sees the EU as a non-political body that regulates the common EU market, which means that the effectiveness of the EU decisions is what really matters. The outcomes of regulation are Pareto-efficient (some benefit and no one loses) rather than redistributive (where there are both winners and losers). This means that the legitimacy of EU policy-making is based on the policy outcomes not democratic input (Majone, 1998, 2000, 2002a, b in Follesdal and Hix, 2006 p.538). Reflecting on the future of European integration, Majone anticipates the possibility of the emergence of a number of ‘clubs’ or associations of European states forming around different ‘club goods’, collective security being one of such goods. (Majone 2005 in Majone 2012 p.24). The EU would benefit from greater transparency in decision-making, ex post review by courts and ombudsmen, greater professionalism and technical expertise, rules that protect the rights of minority interests, and better scrutiny by private actors, the media, and parliamentarians at both the EU and national levels (Majone, 1998, 2000, 2002a, b; Dehousse, 1995 in Follesdal and Hix, 2006 p.538).

No democratic deficit. Effective accountability mechanisms are in place.

Andrew Moravcsik (2002) argues that robust democratic control mechanisms exist at the EU level but are often overlooked when unrealistic standards are applied to the EU. These include constitutional checks and balances, the European Parliament and indirect control via national governments. Taken together, these

mechanisms ensure that EU policy making nearly always is transparent, accountable and effective (Moravcsik, 2002 p.605).

The ‘democratic deficit’ debate draws attention to the crucial issue of the nature of democratic accountability at the EU level. As rightly noted by Sjursen (2011a pp.1081-2), if the EU is an intergovernmental (rather than a supranational) entity it is important to identify the criteria for institutionalization of the principles of accountability and autonomy at this level of decision making. She identifies four pillars of democratic intergovernmentalism; these are (1) only sovereign states can be actors with decision-making powers in an intergovernmental system; (2) The right of each member state to veto any decision with which it disagrees is a cornerstone of an intergovernmental system; (3) The third premise concerns the idea that powers are only delegated, and that the member states may revoke or renegotiate them; (4) An intergovernmental system is established to serve the member states and to assist them in forwarding, or protecting, their preferences and values. These criteria provide useful analytical tools for the assessment of the nature of decision making at the EU level from a democratic perspective and whether a democratic legitimacy deficit is indeed present in particular areas of the EU policy making, as discussed in Section 3 in relation to security and CT law.

Secondly, the ‘democratic deficit’ debate shows that democratic legitimacy of the EU is most often discussed in terms of *input* and *output* legitimacy. Input legitimacy relates to procedural criteria or requirements for determining the popular will (majoritarian institutions and citizen representation through vote/elections (Kohler-Koch and Rittberger 2007 p.12; Hix, 2008; Mair, 2006 in Schmidt 2013), although more recently some also consider the representation of interest groups and networks (the contributions and limitations of civil society to democratic representation in EU governance (Kohler-Koch, 2010), while constructivist scholars emphasize the importance of the ideas and communicative processes involved in elections and other forms of discursive interactions with the public and civil society, and how these may contribute (or not) to the construction of a sense of collective identity/political community and/or the formation of a collective political will in a European ‘public sphere’ (Lucarelli et al., 2011; Risse, 2010, pp. 127–57; Steffek, 2003; Zürn, 2000 in Schmidt 2013 p.5; Kohler-Koch and Rittberger 2007 p.12). Output legitimacy, in contrast, relates to the effectiveness of policy making (‘government for the people’). A third criterion of democratic legitimacy advocated by Schmidt (2013) is ‘*throughput*’ legitimacy judged in terms of the efficacy, accountability and transparency of the EU’s governance processes along with their inclusiveness and openness to consultation with the people.

Many scholars have noted the tension between ‘output’ and ‘input’ legitimacy; it has been referred to as the ‘negotiation-accountability’ dilemma or the ‘Faustian Bargain’ (trading ‘democratic values’ for ‘effectiveness of policy making’) (Peters and Pierre 2004 in Kohler-Koch and Rittberger 2007 p.9). Here the importance of protecting core democratic values is prioritized. Others argue that the EU’s performance is the main priority not its legitimacy. Padoa-Schioppa (2011 p.151), for example, argues that ‘the EU today lacks efficient performance rather than legitimate process. In other words, between the EU’s demos and its kratos, the latter is more of a problem than the former’.

‘Effectiveness’ is also understood in a number of ways. While some scholars focus on ‘achieving intended effects’ of policies or ‘solving a specific problem’ (Schmitter 2002 in Heinelt 2007 p.225), others emphasize the quality of decisions and their public acceptability: ‘achieving good, fair results’ or ‘rational and fair’ outcomes (Eriksen 2007 pp.306-8). While decisions need to be rational and efficient to be legitimate, the ability to solve problems rationally and effectively cannot be the only criterion that determines one’s entitlement to participate, as this view overlooks the dangers of inequality (Schmalz-Bruns, 2007 p.289). Furthermore, Schmalz-Bruns (2007 p.297) points to the importance of an effective form of organizational law for a well-functioning constitutional democracy. Aurel and Benz (2007) ask whether national parliaments can play an ‘effective role’ in a democratic EU; others focus on the importance of effective citizenship (Kohler-Koch and Rittberger 2007 pp.10-11) and effective control of public power (Chalmers 2007 p.329). Most approaches point to the importance of understanding effectiveness in a political not merely economic or technical sense (Heinelt 2007 p.227).

2.3 When are the EU's security decisions democratically legitimate?

Kantner and Liberatory (2006 p.372) note that on the one hand, the new security challenges that emerged in the last two decades raised expectations that the EU should play a more active part in security governance, but on the other hand this has raised debates about the effectiveness of security policies and the risks of undermining democratic principles and fundamental rights and freedoms.

The development of the Common Foreign and Security Policy (CFSP), the Justice and Home Affairs 'pillar' and later the Area of Freedom, Security and Justice (AFSJ), the adoption of 'The European Security Strategy' and 'The Stockholm Programme' mark a changing focus of the Union (from economic, social and environmental to security issues) (Kantner and Liberatory (2006 p.373) and an attempt 'to establish itself as an actor with a clearly defined identity and security interests' (Sjursen 2011a p.1088). Three strategic objectives for European security have been set out: tackling key threats, building security in our neighborhood and promoting an international order based on effective multilateralism (Council of the European Union 2003). These developments argue Kantner and Liberatory (2006) contribute to a fundamental redefinition of the relations between security and democracy; these relations no longer belong to the familiar realms of national policies and relations among sovereign states. Concerns have been raised about compatibility between the EU's internal and external security policies and its democratic values. These questions concern both the protection of fundamental rights and civil liberties and the legitimacy of the use of force in international relations (Kantner and Liberatory 2006 p.374; Den Boer et al. 2008; Balzaqc 2008).

Some scholars draw attention to the normative and political aspects of security policies. Security decisions are not purely scientific, technical or military matters or something that should be decided by experts (Eriksen 2011 p.1169); it is a highly political and normatively charged area of decision making and it requires transparency and public debate to reach common understanding (Hillebrand, 2011 p.505). Erik Oddvar Eriksen argues that while decisions about risk and security require specialist knowledge and deliberation under criteria of truth and justice, such deliberation cannot bear the burden of democratic legitimation and cannot replace institutionalized control that enables equal participation of all (Eriksen 2007 p.305; Eriksen 2011). To reach democratically legitimate decisions, it is important to separate facts from values and evaluate normative aspects of the decision including the rule of law, accountability and protection of individual rights. 'The concept of deliberative democracy is particularly well suited for handling such questions, as it is premised on the presumption that only a reasoned debate taking all points of view into consideration, including normative ones, yields a viable outcome' (Eriksen, 2011 p. 1177).

In practice however, it is difficult to identify those responsible for particular decisions in this area and hold them to account because decisions are often made by 'experts' in secrecy, 'behind closed doors'; and also because security governance is characterized by a complex composite knowledge base and involves networks of experts (Eriksen, 2011 p. 1175-6). Kantner and Liberatory (2006 p.377) argue that 'already at the national level security policies tend to bypass democratic procedures', and at the EU level decision making processes are even less transparent, hence security decisions suffer from a 'double democratic deficit'. At the EU level the range of actors involved is not limited to government officials of Member States. For example, in the CFSP area decisions are taken by the foreign ministers of all the member states in the Foreign Affairs Committee (FAC), or by the heads of state and government in the European Council. However, NGOs and private corporations also influence decisions, and most importantly, the permanent intergovernmental institutions in Brussels are involved. These include the Political and Security Committee, various working groups the EU Military Committee, the Committee for Civilian Aspects of Crisis Management, the High Representative and the European External Action Service. Helene Sjursen suggests that these actors play more than simply a coordinating role in this area; they are becoming autonomous actors on their own right. This also means that it more difficult to say 'who really decides' (Sjursen 2011a p.1083-4).

Given the opacity, complexity and fragmentation of the networks of security governance and the underdevelopment of the democratic institutions of the EU, even in the conditions of deliberation argues Eriksen security decisions at the EU level are not democratically legitimate (Eriksen 2011 p.1169). Sjurseren (2011a p.1090) argues that in the area of CFSP ‘to the extent that accountability plays a part, it is a matter of legal accountability (through national courts) and not accountability to elected representatives... As it is difficult to find out where decisions are actually made, it is also unclear who should be accountable’ and it is difficult to trace decisions back to individual ministers or governments. Even though the Lisbon Treaty introduced new legal obligations requiring governments to justify their policies, this takes place among executives, and in the absence of compliance mechanisms it is possible for those in power to act regardless of what they say. Sjurseren’s analysis suggests that although the area of CFSP has not yet become fully supranational it may have moved beyond pure intergovernmentalism. As a result, ‘the ability of the CFSP/CSDP system to live up to the requirements of autonomy and accountability is under pressure’ (ibid., p.1089). Bono (2007 p.432) agrees that both vertical (citizens, national parliaments vis-a-vis the EU institutions) and horizontal (e.g. through the separation of powers of the EU institutions) accountability of EU security policies are increasingly challenging ‘because of the ‘widening of the security agenda’, the extensive use of flexibility mechanisms, and the employment of secrecy and urgency procedures’. Other challenges include the problems of representation in the EU and the lack of clear separation between law-making and executive functions, the ambiguous nature of laws and norms that govern the security domain and the lack of international oversight.

The European Commission (n.d.) argues that the Lisbon Treaty enhances democratic control in the area of justice, freedom and security, through the enhanced role of the EP, increased democratic control from national parliaments and a scrutiny for the Court of Justice. However, further concerns emerge over effectiveness, democratic accountability, rule of law and fundamental rights as a consequence of the new institutional structure of the EU’s security governance. Carrera and Guild (2011) argue that the ‘de-pillarization’ ‘is allowing for the extension of the police and insecurity-led (intergovernmental) approach to spread over the entire EU’s AFSJ’ (Carrera and Guild 2011 p. 200). Cooperation between police, customs and other law enforcement agencies in the area of prevention, detection and investigation of criminal offences remains under unanimity and the consultation of the EP and the jurisdiction of the Court of Justice in these matters also remains limited (Carrera and Guild 2011 p. 200).

This suggests that the new EU’s institutional architecture of security governance did not resolve the questions of democratic legitimacy, effectiveness and impact of security policies. In section 3 these issues are explored further in relation to counter-terrorism law.

3. The legitimacy, effectiveness and impact of counter-terrorism law

Part 3 provides a review of the debates on the legitimacy, effectiveness and impact of counterterrorism law in the EU and identifies key arguments and contrasting positions. It also looks at some examples of the impact of counter-terrorism law on fundamental rights.

3.1 The field of EU Counter-Terrorism

Despite the policy and legislative developments in the area of CT many scholars note that there remains a lack of clarity and consensus as to what it is that the policies are meant to target: ‘counterterrorism’ is not yet a clearly defined area in its broadest and fullest sense’ argues Oldrich Bures (2011 pp.1). Similarly, Cian Murphy argues that states and international organizations ‘have failed to agree a definition of that which they seek to combat’ (Murphy 2012 p. 5). Even though, as noted by Bures (2011 pp.2-3), since 2002 the EU possesses a common definition of terrorism, it has been criticized by many scholars for the lack of precision. Casale for example describes ‘the definition as somewhat complex and uncertain and leaving room for opposite interpretation of the same fact’ (2008 p.62). Symeonidou-Kastanidou (2004 p.28) agrees that ‘in spite of the definition of a terrorist offence within the Framework Decision, both the elements of

the criminal conduct in question and the essence of the legal rights affected by it remains, to a large extent, undefined’.

Lang (2011) draws attention to the breadth of the definition presented in the EU Council Framework Decision on combating terrorism (European Council, 2002) and that it is much broader than that presented by the UN High Level Panel on Threats, Challenges and Change in December 2004 (AI, 2005:8 in Lang 2011 p.4). The definition was further extended in 2008 ‘to include public provocation to commit a terrorist offence as well as recruitment and training for terrorism, adding that this is applicable also if it is carried out via the internet’ (European Council, 2008b in Lang 2011 p.4).

Despite there being no broadly accepted definition of terrorism, Edwards and Meyer (2008 p.5) identify some common elements shared by existing definitions, arguing that it can be viewed as ‘a form of political communication by means of threat and actual violence’. However, they go on to argue that perceptions and conceptions of threat are very different in different member states. For example, they note stark differences between the Scandinavian and many Eastern European countries on the one hand and the UK, France and the Netherlands on the other, where radicalization of European Muslims is seen as a threat and international terrorism is seen to be linked to a wide range of other threats (Edwards and Meyer 2008 p.7). The priority given to terrorism also varies significantly across countries. There is thus a question of the extent to which terrorism represents a common EU problem. Carrera and Guild (2011) note that the majority of terrorist acts reported by the member states are embedded in local and national contexts and only national and local authorities have full access to them. They argue that for this reason it is difficult to call terrorism a common EU issue or develop a common approach.

Thus the lack of a precise definition and the differences in the perceptions of threat lead to variations in member states’ responses to terrorism and the extent to which they implement the Framework decision. Scholars (Bures 2011 pp.1-2; Monar 2007 p.310) note the lack of full and timely implementation at the national level of the key legal EU counterterrorism instruments, including the common definition of terrorism. Casale (2008 in Lang 2011 p.4) notes that ‘whereas some member states have not diverged significantly from their own national terrorism legislation, those who lacked such a basis in the first place have basically transposed the Framework Decision exactly into their national legislation – “failing to remedy the problem of vague definition”’. The main obstacle to harmonization of the legal framework is that member states continue to perceive terrorist threats as national ones and prefer to develop national responses rather than to subject themselves to supranational rules, institutions and decision making (Monar 2007 p.309). Legitimacy is a problem because of a significant negative impact of the measures on civil liberties and human rights. This raises questions concerning effectiveness, appropriateness and proportionality of these measures (Bures 2011 pp.1-2).

The lack of a precise legal definition is problematic from the point of view of the state’s responses to real or perceived threats. As noted by Murphy (2012 p.6-7) the problem of definition ‘is compounded by the state’s tendency to overreact to it’. He adds that there is no shortage of examples of states that ‘have strayed from fundamental legal principles in their attempts to respond to the real or perceived threat of political violence’ (Murphy 2012 p. 6). Monar (2007 p.311) agrees that there is a risk that major anti-terrorism objectives are agreed upon by the member states in the Council in the form of programme documents or even framework legislation, which can then afterwards lead to more controversial restrictive measures at the national level. Bossong (2008 p.26) argues that ‘adequate political control *before* the Council can agree on new counterterrorism measures is vital. Otherwise, each crisis or terrorist attack may lead to a new security policy that would not have been acceptable under ‘normal’ conditions of decision-making’. He goes on to say that even if the EU’s counterterrorist policy represents a rational bargain among nation-states this does not mean that national executives represent a ‘balanced’ position at the EU-level and that the questions of political legitimacy, both input and output remain.

3.2 The legitimacy of counter-terrorism law – a review of the debate

The EU's CT policies have been criticized widely for their tendency to undermine democratic oversight and civil liberties ((Delpech, 2002; Keohane, 2005; Guild, 2007; Bigo, 2006; Loader, 2002 in Edwards and Meyer 2008 p.15). Several features of the EU's governance of counter-terrorism that raise concerns regarding democratic legitimacy of such measures are considered below.

Expanding security governance area leads to the weakening of democratic control

First, the governance of counter-terrorism prior to Lisbon Treaty is described by researchers in terms of increasing cross-pillarization (the blurring of the differences between the three pillars) so that it was possible to use pillar-specific governing modes to pursue particular objectives (Edwards and Meyer 2008 p.11). This created a possibility to override the legal mechanisms of the pillars in case of political necessity (Balzacq 2008). Guild (2008 p.174) describes the mechanisms by which the EU has entered the field of CT: first through Justice and Home Affairs where democratic oversight and control gradually developed, and then expanding to the common foreign and security policy, a more intergovernmental area of policy making and where democratic controls are considerably weaker. This policy area also expands beyond existing democratic controls via networks of experts characterized by variable patterns of information sharing (Bigo, 2006, in Guild 2008 p.174). Bures (2011 pp.1-2) notes that CT policy 'already spans across a number of other policy areas across all of the EU's former three pillars'. Eriksen (2011) further argues that the lines of authority and accountability are increasingly complicated and accountability through delegation is difficult because the decision making bodies enjoy broad autonomy and discretion; it is not always clear to what extent security and defence policies remain intergovernmental and to what extent they become supranational/European. He notes that 'The field has a tricky in between status, which makes accountability difficult' (Eriksen 2011 p.1178-9). This capacity of CT policies to cross existing policy frameworks increases the need for judicial and parliamentary oversight.

The lack of transparency and accountability in horizontal governance networks

Horizontal CT networks involve various agencies and create informal communication forums between them in addition to the formal ones. They also involve third parties, adding further to the complexity of the governance networks. This, note Edwards and Meyer, has political significance, particularly in light of the EU-US cooperation and information exchange (Edwards and Meyer 2008 p.11). The international nature of the CT networks, their loose structure and the variety of actors involved fragments accountability and limits effectiveness of parliamentary and judicial scrutiny of decisions (Hillebrand 2012). Eriksen (2011) argues that transnational 'network' governance structures cannot substitute state-based government. Not all those affected can be heard through this mode of governance and participation and the scope for an open and rational scrutiny of decision making through networks is limited. A merging of various forms of expertise poses a threat to the fundamental freedoms of individuals (Eriksen 2011 pp.1180-83). These areas lack transparency; for example, concerns have been raised about the democratic accountability of the actions being carried out by FRONTEX, the European Union agency for external border security (Bigo et al 2006 p.18). The whole Area of Freedom, Security and Justice lack transparency (Lodge, 2006b in Bigo et al 2006 p.23). Bigo et al argue that this policy area requires 'an open political culture, transparent procedures and practices, a commitment to openness that is entrenched through institutional accountability' (2006 p.23).

Den Boer et al (2008) examine in detail horizontal and vertical CT governance arrangements. They identify several criteria of democratic legitimacy including parliamentary and ministerial accountability, a delegation of sovereignty from the voters through the parliament and ministers to administrative bodies, a formal endorsement by the parliament of a strategic policy-plan and possibly a budget, and the presence of the appropriate parliamentary body that can exercise oversight (ibid., p. 106). They conclude that vertical CT arrangements tend to raise fewer legitimacy concerns than horizontal network arrangements. Thus, there appears to be a trade-off between effectiveness and legitimacy (ibid., p.103). They argue that horizontal networks can only be legitimized if they can demonstrate that their output legitimacy is higher.

In other words, high effectiveness of transnational CT governance arrangements may justify their legitimacy deficit (*ibid.*, p.119).

Claudia Hillebrand (2012) examines Parliamentary and Judicial scrutiny of CT policing (CTP). She argues that both internal and executive (ministers reporting to parliamentary committees) accountability for EU CTP has serious limitations, such as the networked nature of counter-terrorism policing, where accountability is fragmented. Given the public importance and moral seriousness of the CTP (the issues of data mining, surveillance, the use of torture, to name but a few examples) external scrutiny mechanisms are required. She then looks at the Parliamentary and Judicial scrutiny of CTP (the two cornerstones of democratic legitimacy). The role of EP in the field of Police and Judicial Cooperation in Criminal Matters (PJCC) pre Lisbon Treaty was very limited. The Parliament had a consultative role, but its opinions were non-binding for the Council and it had sometimes little time to examine proposals; similarly, powers to oversee Europol were limited; EP had no direct scrutiny of Europol's budget and remained largely excluded from the CT policies; (p.135). EP was completely excluded from the two agreements between the EU and the US on extradition and mutual legal assistance in criminal matters signed in 2003. Now, post-Lisbon, it has co-decision power with the Council (including qualified majority voting in the Council); in relation to Europol it has 'budgetary appropriation and discharge functions' (p.136) and more changes are to come in the next few years in terms of oversight; also the EP's powers concerning the external sphere of PJCC have been extended (the right to veto). An example of the use of these powers is the rejection of the EU-US SWIFT agreement on the sharing of financial data in February 2010 (Hillebrand 2012 p.136).

With regards to national parliaments (NPs) Hillebrand's analysis shows that they maintain individual procedures for scrutinizing EU affairs with the purpose of ensuring democratic accountability; most of them have a committee on European affairs, sometimes supported by sectoral subcommittees; two systems of scrutiny are being used: a document-based and a mandating model (Hillebrand 2012 p.137). Pre-Lisbon Treaty, NPs role with respect to counter-terrorism policing was severely limited, however they had a better opportunity to influence law than the EP because of the unanimity requirement; however in some areas (such as immigration and asylum) NPs lost this power after 1993 with the introduction of qualified majority voting in the Council and NPs could no longer influence decisions by pressuring their governments to veto decisions. Overall, the EP has been more successful in gaining powers of oversight and co-decision. There were variations between NPs in the influence they had over their governments and in the involvement in discussions of EU decisions and the level of information in relation to AFSJ; information was lacking in particular in the area of CT (p.138). The role of NPs has been criticized for the lack of effective scrutiny procedures leading to delays. The Lisbon Treaty envisages a more active role for NPs in EU policies and with respect to AFSJ (p.139). Hillebrand argues that the Lisbon Treaty introduces partly contradictory changes in this respect; in some respect the role of NPs diminishes (with regards to the Europol's legal base), but at the same time provides the possibility for joint scrutiny by the EP and NPs (pp.142-3). Hillebrand also notes that parliamentary investigations into the allegations of extraordinary rendition show a serious lack of parliamentary accountability and lack of cooperation of the EU officials and institutions (Hillebrand 2012 p.149).

3.2.1 The European Arrest Warrant

EuroMove (2011) explains that 'the European Arrest Warrant (EAW) was created in 2004 to ensure direct enforcement by a judge in one Member State of a warrant for arrest issued by the judicial authority of another Member State. An EAW may be issued for any offence punishable by the law of the issuing state with a maximum sentence of 12 months or more, or, where the person has already been sentenced, provided it is a sentence of at least four months imprisonment' and that while it is widely viewed as a successful innovation there have also been some problems such as proportionality (it can be used to pursue people for relatively minor offences) and rights of the individual (unfair treatment, lengthy pre-trial detention and lack of legal assistance). Casale (2008 p.65) also expresses concerns that the warrant 'might reduce the basic rights of defence and the right to a fair trial guaranteed in Member States by their constitutional charters'.

Murphy (2012 p.193-5) notes that the partial abolition of dual criminality brought about by the EAW is problematic. The dual criminality rule that requires the act to which the warrant relates to be an offence in both the issuing and executing states was abolished for 32 offences including terrorism. Murphy argues that the lack of clarity in the definition of offences and the differences in the legal frameworks of member states lead to difficulties with and reluctance to transpose relevant provisions. There are also differences amongst member states safeguards and concerns in relation to 'differing treatment for domestic nationals and other EU citizens'. He also notes that this measure relies on national law enforcement authorities to act lawfully (p.213). Lang (2011 p.4) notes that 'because national legislation can go further than that of the EU, member states are now able to use the EAW to enable surrender of certain individuals from other states even if the activities of the individual or group are not considered to be terrorist in nature in that state – the surrendering state is not able to refuse on this basis under the EAW'. Further, the system of 'mutual recognition' can only work if there is a 'high level of trust in each others' criminal justice systems' (Murphy 2012 p.186). Lack of trust raises questions about the legitimacy of this measure.

Others raised concerns in regards to the lack of democratic scrutiny of the Framework Decision on the EAW. For example Sanger (2010 p.36) notes a relatively short period between the Commission putting forward the proposal and it receiving political agreement. He also argues that the EP had very little involvement, while Member States found themselves under intense political pressure from the Commission and the Council to demonstrate action in response to the threat of terrorism. The lack of democratic accountability and transparency in the adoption of the decision is also noted by MacCormick (2005 par.7) who reminds us that 'at the time of the Framework Decision, all meetings of the Council of Ministers were held in private, indeed, in secret. Each would be preceded by even more impenetrable meetings of the Committee of Permanent Representatives (COREPER)... it is almost impossible for the Parliaments of the Member States to have, in advance of such a decision, any effective debating or decision-making process that secures effective answerability of their Ministers for the line they take on it'. He concludes that democratic controls are lacking in this case.

3.2.2 Asset Freezing Sanctions

The asset-freezing sanctions are similarly criticized on the grounds of the lack of democratic accountability and violations of human rights. UN Security Council resolution 1373 adopted in 2001 required states to adopt measures to freeze the assets of those linked to terrorist acts, but provided no definition of terrorism. Murphy (2012 p.140) argues that this seems to indicate that states are expected to apply national law which is problematic, not least because it provides possibilities for identification and targeting of specific individuals. The presence of multiple definitions of terrorism in such documents also breaches the principle of legality, argues Murphy.

Guild (2008) discusses the creation of lists of organizations and persons who are suspected of having links with international terrorism and as a result have their assets frozen. She argues that the way in which the listing took place and its consequences for individuals have raised serious questions of human rights compliance. She asks how individuals and groups are selected for the list and explains that in practice 'the Member States put forward the names of persons and groups which they considered ought to be deprived of all funds. Those names and groups were added to the list without any examination by the Council (or Commission) of the reasons (none having been required or given) of the Member State which proposed the addition' (p.180). Guild argues that decisions such as this are made in relative privacy by a small group of security actors and are 'passed to the national level with all the authority of an EU decision' (Huysmans 2006 in Guild 2008 p. 175). This weakens the effectiveness of national mechanisms of democratic and judicial control. She notes that a new policy regarding the way in which individuals and groups are added to the list was adopted in 2007. In particular, the Council will provide a 'statement of reasons' to the parties concerned for maintaining them on the list; secondly, the individuals and groups concerned will be informed about the opportunity to make their views known and these views will be taken into account before the Council takes any decision on whether to retain their name on the list. Guild (*ibid.*, p.189) comments that 'Member States are therefore required to account to the Council for their acts in respect of the individual' as they will now have to explain to the Council the reasons why they seek to list the

individual and the individual concerned can subsequently challenge the decision. This she argues is a potentially radical change in that it creates a link of legal responsibility between the individual and the CFSP.

Human rights implications of asset freezing sanctions are discussed in subsection 3.4.

3.2.3 The Lisbon Treaty and the democratic legitimacy of counter-terrorism law

The Lisbon Treaty has introduced a number of changes to the EU's AFSJ policy landscape with potentially significant implications for democratic legitimacy of CT measures. Of particular relevance are increased powers of the EP (the co-decision power) and the jurisdiction of the Court of Justice of the European Union to review and interpret AFSJ law and actions. Important human rights reforms have also been implemented. Carrera and Guild (2012 p.20) comment that 'The EP has ... become a co-owner of the EU AFSJ...and has been actively involved in AFSJ decision-making procedures and policy priority-setting since the end of 2009' and that 'the EU AFSJ is now in a different phase of European integration, in which institutional pluralism and democratic accountability are embedded in its foundations and working habits' (p.14). They cite the voting down in February of 2010 of the so-called 'SWIFT agreement' between the EU and the US as an example of the new role of the EP. The agreement on banking data transfers to the USA via the SWIFT network was voted down on the grounds of poor protection of fundamental rights such as the right to privacy and concerns about potential misuse of data. A number of concessions were gained, even though when the agreement was eventually adopted, concerns about privacy remained (Digital Civil Right Europe 2010).

Hillebrand (2011 p.514) notes however that while the EP's scrutiny powers have been strengthened, 'the picture is more blurred when it comes to the role of the NPs, in particular due to changes in Europol's ratification procedures'. She explains that in the past, NPs used to be involved in the ratification process concerning the proposals to amend the Europol Convention and the Protocols thereto. This process she argues could push NPs to scrutinize the work of Europol. However, in 2010 this process was replaced with a Council decision. Hillebrand fears that this might mean the end to direct involvement of NPs in changes to Europol's legal framework. This in her view manifests a loss of powers for NPs. She also comments that 'neither the EP nor the NPs have been able to make full use of their new powers and rights so far'.

The strengthening of the role of the EP since Lisbon has been perceived by national governments as a loss of control over matters of justice and security. They 'seek to retain their discretion and push through their own agendas' (Carrera and Guild 2012 p.12). For example, the Council's Strategic Response to Migratory Pressures is a product of such pressures, argue Carrera and Guild. They note that the debates surrounding the Schengen system also illustrate this trend of member states trying to return to intergovernmentalism (p.12). The UK government's position in relation to the Justice and Home Affairs (JHA) is also a case in point. Theresa May argued in July 2013 that '...the whole justice and home affairs structure since Lisbon takes too much control away from elected national Governments. The Commission or the Council propose a measure, and the UK has the right to decide not to opt in, but if we decide that the measure is in the national interest and we do opt in, we are subject not only to qualified majority voting in the Council but to co-legislation rules in which the European Parliament is considered to be an equal to the Council of Ministers. Elected national Governments are sidelined—and that is before we even consider the role of the European Court of Justice in interpreting the measure once it becomes binding...'.

It is important to see what the current legislative and policy priorities in the AFSJ are. Carrera and Guild (2012) observe that legislative and policy instruments adopted during the last three years focus predominantly on (in)security, while liberty related proposals 'have experienced substantial blockages' (p.10). They give examples of proposals dealing with the exchange of information (data processing) within and outside the EU for law enforcement purposes, such as the Terrorist Financial Tracking Program and agreements on passenger name records with the US, as well as the development of large-scale databases and information systems and the setting-up of the new EU Agency for large-scale IT systems in the area of freedom, security and justice (Carrera and Guild 2012 p.11).

It is also important to note that not all areas of security and justice are equally subject to democratic control. While the EP has now co-decision powers with respect to most matters of JHA, operational police cooperation is an exception and remains 'subject to the unanimity in the Council and where the EP has only to be consulted' (General Secretariat of the Council of the EU 2009 in Hillebrand 2011 p.506). Furthermore, the Lisbon Treaty provides new tools to enhance police and judicial cooperation (Europa 2010). Hillebrand argues that 'due to the strong role of the executive in this policy field, citizens have only limited and rarely direct impact on the field... It is therefore likely that accountability and transparency in this field remain problematic under the Lisbon Treaty' (Hillebrand, op.cit.).

In the area of CFSP the influence of the EP has gradually increased over time (Sjursen 2011a). Its powers increased with the establishment of the European External Action Service, the department that manages general foreign relations, security and defence policies. For example, the Parliament oversees budget and has co-decision powers within the staff and financial regulations and consultative powers with regards to overseas missions (Bien, 2010; Rettman, 2010; Mahony 2010). This arguably provides an opportunity for greater transparency in the EU's external action and policy (Bien, 2010). But, argues Hillebrand, 'simply strengthening the powers of the EP may, however, not be a sufficient solution to the democratic challenges of the CFSP. As already noted, it is the lack of clarity with regard to where authority and power actually lie that is the greatest challenge' (2011 p.1091).

The fact that the EP does not have a formal role in the area of CFSP, and the overlap between the competences of AFSJ and CFSP create a potential for inter-institutional conflicts, particularly in relation to CT law. Monar (2012 pp.28-9) notes that 'This overlap can give rise to questions and even tensions between institutions regarding the boundaries between external AFSJ and CFSP measures'. An example of this was the conflict that emerged in the process of adoption of the amendments to the regulation 881/2002/EC imposing restrictive measures against certain persons and entities associated with Al-Qaida, the Taliban and Osama Bin Laden. The Council had adopted this Regulation on the basis of (CFSP) Article 215(2) TFEU under which a unanimously adopted CFSP decision is implemented by qualified majority in the Council on a joint proposal from the High Representative and the Commission. The European Parliament only has to be informed about the adopted measures. In contrast, under (AFSJ) Article 75 TFEU, the Council and the European Parliament act in accordance with the ordinary legislative procedure, and without a prior CFSP decision. The Committee on Legal Affairs of the European Parliament contested this decision, which resulted in an action of annulment before the Court of Justice (Van Elsuwege, 2011). Monar (2012 pp.28-9) comments that Article 75 'provides an explicit legal base for the adoption of administrative measures aimed at freezing terrorist assets but the Council had preferred – no doubt primarily in order to avoid co-decision by the European Parliament under the "ordinary legislative procedure" ...– to use the much wider legal basis provided by Article 215(2) TFEU for imposing economic and financial sanctions in the CFSP context'.

3.3 The effectiveness of counter-terrorism law – faster extradition?

As noted in subsection 2.2, different understandings of effectiveness are present in the debate about democratic legitimacy of the EU. This is also true in relation to CT law.

A common way to look at the effectiveness of CT measures is in terms of the capacity of the EU agencies. A number of scholars argue that in that sense the effectiveness of CT is low. Bures, for example, (2011 pp.1-2) argues that '... the capabilities of EU agencies in the area of counterterrorism remain rather weak and the EU counterterrorism coordinator does not have any real powers apart from persuasion. Long-standing bilateral and/or non-EU multilateral arrangements are still clearly preferred by EU MS national agencies tasked with counterterrorism and a similar preference can often be traced at the political level'. In large part the weakness of EU agencies stems from the lack of information. Europol's main problem is arguably the imperfect flow of information from national intelligence services (Casale, 2008 p.57). Without such information it is unable to perform its tasks. However, in practice Member States are reluctant to share

intelligence with Europol. Eurojust experiences similar problems. Edwards and Meyer (2008 p.9) similarly argue that Europol and SitCen remain restricted in the exercise of their duties because intelligence from member states 'has not always been forthcoming'. They also note that the vital competences and resources remain at the national level.

Bossong (2008) analyses the capacity of the EU to achieve its strategic objectives set out in the EU's Counterterrorism Strategy such as Pursue, Protect, Respond and Prevent. He argues that the EU has been able to use windows of opportunity after major terrorist attacks to develop more security policy cooperation in the areas of border and travel and criminal justice. However, he describes the development of the EU counterterrorism policy after 9/11 as increasingly uneven and contingent, with the Counterterrorism Strategy having no direct impact on policy-making. Like other authors, he argues that the EU is unlikely to acquire the necessary competences to prevent terrorism, and that this will undermine output legitimacy of the EU counterterrorism effort. The effectiveness of its policies will continue to be restricted, on the one hand, by the lack of intelligence information sharing, cultural and institutional obstacles to more police and criminal justice cooperation under an EU framework which 'can only be overcome very slowly'(p.13), and on the other hand, by judicial and political criticism of the policies. Bossong goes on to argue that the EU has almost no competences in matters of integration, education and social policy (p.18) and thus cannot effectively counteract processes of radicalization and recruitment to terrorism (p.19) and that 'there is only sporadic evidence that the EU is an effective 'normative power' for global justice and democracy' (p.20). He concludes that the inability of the EU to do much in terms of preventing terrorism seriously limits its output legitimacy (Bossong, 2008, pp.22-3). A similarly pessimistic view is expressed by Monar who believes that the core of the problem is that when it comes to implementation, the EU still has to struggle with 27 different systems with their own priorities and procedures (Monar 2007 p.310).

In contrast to such evaluations, more optimistic assessments of the EU CT measures come from the EU officials. For example, EPP-ED Spokesman, Panayiotis Demetriou (2006, [p.?](#)) says: 'The European Arrest Warrant has proved to be one of the most effective instruments in the field of police co-operation in the fight against organised crime, especially as compared to the traditional extradition proceedings. Some reforms are however necessary to improve on its effectiveness'. In terms of the expediency of extradition, EAW seems to be able to claim success, as it is broadly acknowledged that it has been successful in terms of reducing delays in extradition within the EU (EuroMove 2011). Some other commentators also provide positive assessments of CT policy and particularly the EAW, for example Bures (2011 pp.2-3) argues that 'at least in some aspects and areas, the EU counterterrorism policy is, albeit slowly and inconsistently, becoming a real tiger'. The main achievement in his view is the adoption of a common definition of terrorism in 2002 allowing for the introduction of such instruments as the European Arrest Warrant. Bures also argues that Europol and Eurojust are also increasingly recognized as doing a good job in the area of counterterrorism. Murphy (2012 p.184) argues that the European warrants are 'examples of the establishment of a new rule of law in EU criminal justice'.

With regards to asset freezing, the European Commission (2012) in its RoadMap for 'the Framework for administrative measures for the freezing of funds, financial assets and economic gains of persons and entities suspected of terrorist activities inside the EU' lists several advantages of the measures such as the widening of the scope of control (measures are no longer limited to respective member states), the ease with which financial institutions working in various Member States can control whether funds are linked to listed persons/entities, the possibility for all Member States to contribute to the identification of persons/entities concerned and take advantage of other Member States' experience and knowledge regarding persons and entities linked to terrorism, and potentially better compliance by Member States with the global Financial Action Task Force standards.

However, the above assessments tend to focus mainly on technical aspects of the effectiveness of CT law and overlook the relationship between legitimacy and effectiveness. Murphy for example (2012 p.225) notes that effectiveness in the field can be understood in two senses: effectiveness and uniformity of the

law; the former he argues has had an adverse effect on the latter; this raises the question of how much diversity should EU law permit when attempting to pursue CT (p.226).

A different approach is taken by Schneider et al. (2010 pp.45-6) who consider broader effects of CT efforts. They argue that the ‘second order effects’ of CT measures are often overlooked. For example, CT efforts might divert public spending away from potentially more effective projects towards security. It is not clear whether the measures achieve their aims and whether they are cost effective. An example are security measures at borders, ports and airports that produce transportation costs which may distort economic activity, while not being a particularly effective security means at the same time. Security considerations are given priority over political objectives of democracy promotion and human rights protection in neighbouring regions. A change in foreign policy is also a second-order effect of terrorism in Europe; it may bring short term benefits, but support of non-democratic regions may contribute to the production of more grievances and thus transnational terrorism. They also argue that CT efforts may lead to transference and substitution effects, such as transference of terrorist activity to more vulnerable countries in other parts of the world or change in the tactics of terrorists (for example, making attacks on trains or buses instead of airports). Similarly, Lang (2011) argues that the effect and impact of the CT strategy is unclear and may even undermine European security. Interestingly, attempts to evaluate the capacity of CT measures to reduce the risk of terrorism are rare. An evaluation by Lum et al (2006 p.489) concludes that ‘not only did we discover an almost complete absence of evaluation research on counter-terrorism interventions, but from those evaluations that we could find, it appears that some interventions either did not achieve the outcomes sought or sometimes increased the likelihood of terrorism occurring’.

If effectiveness is understood as ‘output legitimacy’ the question then is whether there is a tradeoff between output and input legitimacy of CT measures such that it can justify an input legitimacy deficit (or, if greater output legitimacy can justify the lack of input legitimacy). In view of Den Boer et al, we need a systematic evaluation of CT initiatives in order to establish ‘whether an (assumed) superior output legitimacy is able to compensate for the shortcomings in terms of input legitimacy’ (2008 p.120). Lister and Jarvis (2011 p.1) in turn argue that ‘...clearly whether counter terrorism powers are effective is a key concern, perhaps even a central one, to their assessment. But this rather narrow criterion cannot be the only concern meriting the revision of such powers’. They cite Jeremy Waldron who concludes that ‘in actuality it is not the liberty of all for the security of all, but something more akin to the security of the majority for the liberties of the minority. This does not provide justice and, for a minority, has a serious and negative impact on their security. In the process this therefore fails also either to ensure or increase security; for the majority or the minority (Waldron in Lister and Jarvis 2011 p. 2). Similarly, Kantner and Liberatore (2006 p.375) ask, ‘should democracies allow lower fundamental rights standards in order to guarantee security? ...the question is whether and how exceptions to the rule of law can be justified on the ground of security needs, or whether ‘exceptionalism’ itself becomes a crucial threat to democracy’. Manoharan (2011 p.18), looking at the experience of India, concludes that ‘One cannot... come to a firm assertion that the counterterrorism legislation in India has increased overall security in general. On the contrary, it has been counter-productive because of significant human rights concerns’; he adds that ‘attentiveness to human rights concerns is not simply a moral and legal imperative, but also a crucial strategic imperative’.

3.4 The impact of counter-terrorism law

The key challenges in this area are (a) the impact of CT measures on the basic democratic principles and values as espoused within the EU; (b) the impact of CT measures on the practice of EU governance; (c) the impact of CT measures on demos, or the experiences of the EU citizens of the basic democratic principles and values. This section briefly considers each of the challenges in turn.

The impact on the values and principles of democracy as espoused within the EU

The Treaty of Lisbon confirms that the three core principles of democratic governance in Europe are:

- 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
- Participatory democracy: new forms of interaction between citizens and the European institutions, like the citizens' initiative (Europa n.d.).

It is also stated that 'human dignity, freedom, democracy, equality, the rule of law and the respect for human rights: these are the core values of the EU which are set out at the beginning of the Treaty of Lisbon' (Europa n.d.). It would appear at first glance that these statements expose a clear and uniform understanding of what the core democratic principles and values of the EU are. But is it really so? Do these statements represent a common understanding shared by all the citizens of the EU and their elected representatives? And what do they really mean? How can European institutions give equal attention to all citizens? What does a greater role for parliaments involve? What forms of interactions between citizens and EU institutions embody the principle of participatory democracy? And how does the EU uphold and protect these democratic principles and values? In practice, democratic values may be no more than a set of political declarations contained in various legal and policy documents produced by the various EU institutions. If one agrees with the view that the EU has a 'democratic deficit' (no demos, underdeveloped institutional architecture) then it may be difficult to speak about common democratic principles and values; these may be no more than political statements or a sum of diverse understandings that differ across member states.

On the other hand, if we assume that the EU's basic democratic values and principles are what the Lisbon Treaty says they are, what is (if any) the impact of CT measures on them? Does the mere fact of the adoption of CT measures automatically mean that they will lead to an erosion of democratic values? Not necessarily so. While CT measures are often criticized as undemocratic on the grounds that they 'bypass' ordinary democratic channels, in principle, urgency and secrecy do not exempt these measures from democratic control. For example, Bono argues that 'a number of mechanisms do exist simultaneously to both protect state secrets and allow parliaments, the courts and affected citizens to be involved. In the parliamentary field, this includes the creation of specialised parliamentary committees with the right to access sensitive information (Bono, 2006 p.443). Eriksen (2011, p.1174) similarly argues that 'as long as the principles and guidelines for secrecy are publicly debated and regulated, actors may operate, within given parameters, in secrecy without violating democratic norms. Hence, the field of foreign and security policy is not exempted from the rules of the democratic game.' This means that in principle, CT and other security measures are not by definition undemocratic, but they do depend on how democracy is defined and what principles are included in the definition. For example, if human rights are not, or not fully included, a CT measure that affects these rights is not necessarily undemocratic. An evaluation of the impact of CT measures on democratic principles and values then depends not only on what these measures do and how they are adopted, but also on an understanding of democratic principles as espoused within a given polity, how these principles are defined and upheld and how they change.

If democratic principles and values are not fixed but are in the constant process of definition and redefinition, policy discourses provide an insight into the impact that the discussion and adoption of CT measures might have on these values. From this perspective, the discourses affirm or change the meaning of democracy, freedom and security within the political system. Democratic principles and values may change in radical ways when CT measures are constructed and presented in such a way that they appear to require a sacrifice of certain rights and liberties in the name of protection of arguably more fundamental democratic values. This then may lead to an erosion of certain values and principles. For example Tsoukala (2005, par.2) argues that in the parliamentary debates about terrorist threats 'exceptional rules are presented nowadays as absolutely necessary for the protection of the European populations'. The security and safety arguments are justified with reference to democracy and sovereignty. The 'continuum of threats' assumption links terrorism to immigration leading to a call for the adoption of exceptional rules

with regards to migrants; this line of reasoning, argues Tsoukala, implicitly subordinates the value of human rights to that of security. Freedom is redefined in a negative way and the place of human rights in democracy is reframed. Politicians focus on the protection of public safety and security and the immigration and asylum issues, while denying the frame-regulating role of human rights and civil liberties (Tsoukala 2006 p.622-3). The discussion and adoption of CT measures can thus potentially radically change the ways in which democracy is understood, and what the relative 'weight' of civil liberties and freedoms is in the political system.

The impact of CT measures on the practice of EU governance

In practice, the extensive use of flexibility mechanisms and the employment of secrecy and urgency procedures associated with the adoption of CT measures tend to create greater distance, or 'remove' policies and processes from citizens' influence (Sjursen 2011a p.1092), making decisions less transparent and less accountable, and more difficult to trace decisions back to authorization by citizens. The measures that have initially been adopted as 'exceptional' or 'emergency' may become permanent, part of ordinary governance; the exception becomes the rule (Tsoukala, 2006).

The arguments of secrecy and urgency have been used at the EU level to avoid normal democratic processes in the adoption of security measures. Giovanna Bono's research on the role of four national parliaments in controlling ESDP operations Artemis and Concordia showed that three of the four parliaments were unable or unwilling to exercise supervision over the operations in the ex-ante accountability phase (2006, p.441). She argues that on many occasions parliaments have been excluded or denied access to relevant information. This has been justified by the urgency of the decisions (ibid.). The same applies to the European Arrest Warrant adopted urgently and with little involvement of the European Parliament, as discussed earlier. There was insufficient room and time to discuss the EAW because of the post 9/11 political atmosphere and Member States feeling under pressure to speed up the process. As a result, 'fundamental rights issues were largely sidestepped'; nongovernmental organizations, interest groups, and individuals were not involved at all. There was lack of parliamentary control at both national and European level and thus the measure 'experienced considerable democratic deficit' (Sanger 2010 pp.35-8).

The impact on demos

The main negative impact of counter-terrorism on demos is the restrictions it places on civil rights and liberties, the uneven distribution of the restrictions of freedoms and the creation of suspect communities (Mythen et al 2009; Pantazis & Pemberton 2009). It has also been argued that it has a 'criminalising' impact on civil society organisations (Quigley and Pratten 2007).

The 2002 Framework Decision on combating terrorism (2002/475/JHA) has been criticised for compromising freedom of expression and for its focus not on the actual acts, but on the control of individuals who are perceived to be a threat (Kaiafa-Gbandi 2009 cited in Mitsilegas 2009 p.526). Mitsilegas argues that 'the shift to prevention in the new offences is evident, as is the attempt to extend the criminal law sphere to certain profiles of individuals and subjective elements whose link with the actual commission of terrorist offences is more and more tenuous' (Mitsilegas 2009 p.526). He also notes that the 2008 amendment of the 2002 decision (Framework Decision 2008/919/JHA) introduces three new offences: public provocation to commit a terrorist offence; recruitment for terrorism; and training for terrorism. He points out that 'these acts (along with the three terrorist related offences in the 2002 Framework Decision, namely aggravated theft, extortion and drawing up false administrative documents with a view to committing terrorist acts) are treated as offences linked to terrorist acts when intentional. However, for any of these acts to be punishable it is not necessary that a terrorist offence is actually committed' (Mitsilegas 2009 p.525). CT law thus has a net-widening effect, expanding the list of punishable acts that are seen to be 'linked' to terrorism.

Asset-freezing measures also have serious human rights implications. Guild considers the implications of the lists and asks what this means for the individual whose assets have been frozen – how does the state go about naming the individual as a suspected terrorist and what are the consequences of the allocation of

such a label? She argues that ‘the individual who is the subject of the national action has no recourse in national law because the national authorities are acting in pursuance of EU obligations. But the individual has no way of challenging the EU measure as it is protected from democratic and judicial supervision as it takes place within the framework of the CFSP’ (2008 p.177-8). Murphy (2012) argues that those targeted are deprived of even most basic due process rights (p.115); central to the sanctions are the listing and delisting procedures (p.118) and these are preventive, so no criminal charge or conviction is required for an individual to be listed; the establishment in 2009 of an Ombudsperson office to review these decisions (a listed person can apply for delisting) is an improvement, however delisting still can be prevented by any permanent member of the Security Council (p.119). Murphy also notes that individuals in many cases have claimed violations of a range of human rights including right to property, to respect of private and family life, and to be free from inhumane and degrading treatment (p.135). Murphy also notes the creation of the Ombudsman position that will assist in the review of listing decisions which has been called a “significant reform” although he also notes contrasting commentary from the academic and judicial fields (Murphy in Lang 2011 p.5).

Guild (2008 p.177) provides an example of Mr Arar:

...the Canadian national who because he was on a list which was available to the US authorities was stopped when transiting through New York and rendered to Syria where he was tortured for more than a year. When he was finally able to return to Canada, the Government opened a Commission of Inquiry which found him completely innocent of any allegations of terrorism, and the Canadian Government complicit in his torture through the passing of his name to the US authorities. The Canadian Government settled 10.5 million Canadian dollars in compensation, including legal costs, on Mr Arar for the damage he suffered (Commission of Inquiry, 2006; see also CBC News, 26 January 2007).

A further example of the way in which the obligation to freeze funds can affect individuals and their families is the case of Mr Yusuf:

Mr Yusuf, a Swedish national resident in Sweden (with his wife and four children), whose name was on both the Sanctions Committee list and the Common Position list, was subject to a full funds freezing action by the Swedish Government. The result was that the family literally had no money. All their resources were frozen and no one was allowed to give them any money as that was also contrary to the provisions... How the family survived until the Swedish authorities found a way of giving them some social benefits is left unanswered (Guild 2008 pp.182-3).

Human rights concerns also have been raised in relation to the European Arrest Warrant. It is argued, for example, that ‘although certain fundamental rights are granted to the individual, still some considerable deficiencies exist. These include the facts that there is neither a reference to the Court, nor legible reference to the ECHR. Also, a provision which allows the refusal of extradition on grounds of human rights is missing’ (Douglas-Scott in Eisele 2006 p. 204). Insufficient human rights guarantees and the differences in the standards of justice across Europe increase the risk of injustice done to individuals, as the example of Andrew Symeou demonstrates:

...a young British man was extradited to Greece in 2009 to face charges in connection with a nightclub death in Zante two years earlier. The evidence against Andrew was tainted from the outset, with complaints of serious police intimidation of witnesses. He was extradited long before the Greek court was ready to try him, and had to spend ten months in appalling prison conditions before being granted bail in Greece. When Andrew’s case eventually came to court, in June 2011, the prosecutor recommended that he be cleared.

Raab argues that ‘the EAW can be revised so that it works fairly as well as effectively’ (Raab, 2012 p.44). This argument is also made by the UK Home Secretary Theresa May who has proposed new safeguards to increase the protection offered to those wanted for extradition through the European arrest warrant (May, 2013).

CT policies lead to the construction of certain individuals and groups as dangerous, or incompatible with the democratic system. Barbero (2012, p.764) argues that ‘orientalization has become a strategy that legitimizes the implementation of immigration regimes, in the sense that certain people need to be categorized and then governed in a certain way because of their constructed incompatibility with determined values such as democracy, the rule of law, freedom or security, among others’. Lister and Jarvis (2011 p.2) comment that ‘in certain parts of the UK, government policy is seen to be targeting wide swathes of its own citizens, producing forms of alienation and disengagement which have potentially serious long term consequences relating to social cohesion, equality and citizenship’. Preventative approaches targeting extremism are often discriminatory and tend to stigmatise Muslim communities as ‘suspect’ (Nasser-Eddine et al 2011). The creation of ‘suspect communities’ leads to the erosion of trust and feelings of injustice and misrecognition (Spalek n.d.). The policies may have an impact on identity formation, however there is no empirical proof of these impacts (Lindekilde and Sedgwick n.d.). The potential negative impact is that counter-radicalisation campaigns are perceived as communicating misrecognition. Non-integrationist, but non-confrontational, orthodox Muslims are excluded from public debate and thus the policies ‘are narrowing the room for manoeuvre in public debates and in relation to collaboration between the authorities’ and non-confrontational Muslims. This has the effect of frightening and alienating of communities (Hickman et al 2011; Choudhury n.d.). ‘Overreaction’ damages government legitimacy (Large 2005).

Considerable discretion of national executives in the field of CT, as noted earlier, together with the differences between criminal justice systems of member states lead in practice to considerable variations in how individual rights are protected in individual cases. Murphy (2012 p.141) provides an example of how the empowerment of executive actors in CT action can have a detrimental impact on rights in individual cases: before 1989 a request for delisting required the support of a member state government; in the case of Mr Yusuf the Swedish ‘engaged in much diplomacy’ on his behalf; while in the Hassan case, the British Government ‘intervened against him in the litigation’. He notes that despite some improvements (no support of a national government is required now) the process ‘remains diplomatic rather than judicial’. Research by Van Riezen and Roex (2011) comparing the UK and the Netherlands demonstrates that the UK CT policy has been very instrumentalist often focusing on criminal justice at the expense of civil rights; based on a nationalist vision of civil rights while neglecting the rights of citizens of invaded countries in the fight against terrorism abroad; its domestic policies aimed at preventing radicalization among Muslims have failed while its counterterrorism policies abroad may have increased the threat of terrorist attacks inside the UK; in many cases the policy is stricter than in the Netherlands, for example, in the case of the Control Orders that allow the imprisonment of terrorism suspects without trial, and suspects are restricted in their trial defence; they conclude that the UK CT policy is more radical instrumentalist than the Dutch policy. Edwards and Meyer (2008 p.14) suggest that ‘in the UK ... a weak tradition of legal institutionalization of civil liberties and human rights coupled with a greater societal acceptance of state surveillance has allowed for more restrictions on the rights of individuals accused of terrorism and a greater leeway for security agencies than in other European countries.’

This also raises a broader issue of whether a distinction should be made between citizens and non-citizens or residents and non-residents. Van Riezen and Roex (2011 p.100) ask whether ‘it is prohibited in all circumstances to kill innocent residents of the invaded countries...to protect own residents against terrorism’. Hudson (2009 in Van Riezen and Roex 2011) ‘morally rejects the nationalist dividing line and proposes an alternative: cosmopolitanism universalism...in which universal [civil] rights are equally applied to all world citizens’, although Van Riezen and Roex note that the problem in proposing a model in which all world citizens would have the same rights is that there is no at present a ‘world judge’ or a global

institution that has the authority to enforce universal rights, and that every state interprets human rights according to its own interests.

Some scholars draw attention to the wider impact of CT measures on civil liberties. Murphy (2012 p.229) argues that although most of the EU CT measures are directed against those suspected of terrorism they also affect the wider public, most notably in relation to freedom of expression and the right to privacy'. Monar (2007 p.311) agrees that 'anti-terrorism measures can have a significant negative impact on civil liberties and human rights. ..National governments can use the argument of a European consensus to push through more invasive measures at the domestic level, and there have indeed been serious questions about the real need for some of the invasive measures agreed upon in the Council.'

Surveillance programmes are clearly among the measures that have such restrictive impact. Christine Wicht (2010) notes that 'the Stockholm Programme plans to join up databases that until now have been separate. In concrete terms, the intelligence findings of the Joint Situation Centre (also known as SitCen), the EU organization responsible for gathering and analysing information provided by the national secret service departments, would be made available to the European Council, the EU Commission, Europol and Eurojust. Joint counter-terrorism centres are planned in all member states, based on the German model established in 2004... Capacities would be increased in order to allow better control of the World Wide Web with regard to "terrorist activities" within the EU. The worry is that the fight against crime and terrorism will be used to pave the way for comprehensive censorship of the Internet, as the discussions in France and Germany over the past year have shown... The crucial question, however, is: what happens when anti-democratic powers are only able to maintain their power and influence and to combat their opponents by abusing instruments introduced for the purposes of crime fighting and counter-terrorism? It would not have been the first time that social protest was itself declared "terrorism".'

Will the Lisbon Treaty strengthen human rights guarantees? Its full implications and effects are probably too early to assess, not least because, as argued by Šlosarcík (2011, p.208) it 'provides a very complicated system of human rights guarantees in the European Union...When fully implemented, the planned human rights structure will be extremely complex, less predictable and very difficult to navigate'. He argues that 'this (potential) ambivalence of the EU 's accession to the EC HR should be explained to the public. The message from the EU should clarify that the EU 's accession to the EC HR shall not be a panacea for human rights violations within the EU, but only one piece within broader system'. Guild and Carrera (2012) comment that: 'the legal force of the EU Charter of Fundamental Rights has profoundly transformed the question of the relationship between liberty, justice and security in EU JHA cooperation from a political to a legal or juridical one, where the rule of law is of paramount relevance (p.9). Importantly, they also observe that 'a majority of the 'liberty-related' legislative proposals (dealing with individuals' fundamental rights and freedoms) have experienced substantial blockages within the Council and some even have no real prospects of formal adoption any time soon (p.10).

CONCLUSIONS AND RECOMMENDATIONS

This report has considered and outlined the understandings of the legitimacy, effectiveness and impact of counter-terrorist measures in democratic theory and practice of the EU. It started with the basic ideas of political legitimacy, security and rights and how these apply to the EU polity. These ideas have provided an analytical framework for the review of the debate on democratic legitimacy of counter-terrorism in Europe.

The review has shown that the debate on counter-terrorism is shaped by different understandings of democracy, security and terrorism as well as of the relationship between them. In practice, an evaluation of democratic legitimacy of CT measures is a daunting task even when the concepts of democracy and security are clearly defined, because of the difficulty of translating the general principles and values into specific decision making processes at various levels of CT governance and interpreting their impact. It is important to develop more communication and dialogue between researchers in order to clarify the aspects and criteria of democratic legitimacy (output, input and throughput legitimacy) that underpin particular evaluations and critical assessments of CT measures.

A democratic perspective on counter-terrorist measures involves questions such as how powers should be divided between the national and the EU levels with regards to the provision of security and the guarantees of fundamental rights and freedoms and what are the proper mechanisms of accountability to ensure the authorization of decisions by citizens. The institutional reforms introduced by the Lisbon Treaty appear to provide mechanisms for the strengthening of democratic controls over security decisions. At the same time, the distinction between where the EU has a role (internal security) and where it does not (national security) is still far from clear and is likely to remain so for the years to come (Brady 2010 p.2). Concerns have been raised about the loss of national sovereignty and the capacity of national governments to protect fundamental rights and civil liberties of their citizens; from the nationalist or state centered perspective, the state continues to be seen to be the best protector of citizens' security and guarantor of rights. On the other hand, liberal scholars raise concerns about the dominance of 'the executive' within the network governance of security.

The 'democratic deficit' of the EU is often raised in relation to its security policies. The key issues are the expansion of the security policy domain and the impact of the network governance of security on the democratic legitimacy of decisions. On the one hand, an argument can be made for greater cooperation and sharing of information to ensure effectiveness of decision making and output legitimacy. On the other hand, even if security networks can potentially create greater opportunities for the sharing of information, such networks can be seen to lack proper democratic accountability, because not everyone can be part of them or have access to information. On the one hand, it is argued that security decisions require specialist competences and knowledge. On the other hand, concerns have been voiced about the rise of 'epistocracy', 'technocracy' or a powerful executive that can bypass democratic channels of accountability.

Some authors see the solution to the lack of accountability of experts in the executive in the return to the principle of intergovernmentalism, while others argue that it is necessary to develop more democratically accountable and transparent institutions at the EU level, and to make executive decision making and lines of authority and power more transparent and accessible to citizens (Sjursen 2011a). For example, an inter-parliamentary forum is proposed as a way to strengthen the democratic accountability of CT policies at the EU level (Hillebrand, 2011).

Bossong (2008 pp.24-5) identifies two normative critiques with regards to the EU counter-terrorism policy: (1) a trend for the dominance of security professionals/expert networks at the expense of wider democratic participation; (2) a continued importance of nation-states and their 'national interest'; in the second view the EU counter-terrorism policy represents a compromise of the diverse interests and a 'rational bargain' between the member states, and if not perfectly efficient is fundamentally legitimate. This literature that has been reviewed in this report appears to lend more support to the first position that critically challenges

the rationality and impartiality of CT measures. But it is also true that if one agrees with the second, intergovernmental position, it does not automatically mean that the problem of democratic legitimacy has been resolved.

The assessment of the legitimacy and effectiveness of CT decisions very much depends upon an understanding of the core principles of democracy, the relative value of representation, participation and deliberation, checks and balances and how they are linked to autonomy and accountability. Another key question concerns the nature of the EU polity – is it an intergovernmental, a supranational body or something in between, and are the traditional state centered concepts of democracy applicable? If the EU is an intergovernmental institution, why should the European Parliament be given more powers? The power and authority of a national, international or supranational body is only justifiable when its democratic nature and status is clear.

The effectiveness of the CT measures is often discussed separately from the question of democratic legitimacy. However, liberal scholars raised concerns about the rapid expansion of ‘the security domain’ when the actual effectiveness of the CT policies remains unclear, while at the same time fundamental rights and liberties suffer. Lack of research in this area is a key problem; there remains, in the words of Edwards and Meyer (2008 p.17) ‘a blind-spot in the scholarly analysis of the policies of counterterrorism, which stems both from the inadequacy of the traditional research methods as well as the increasing institutional and judicial restrictions imposed on alternative methods of academic inquiry’. This means that CT law and policies are often based on ill-informed assumptions or unverified claims and that the right questions – for example, questions about political causes of terrorism - are not being asked.

Similarly the impact of CT measures on the fundamental principles of democracy, the system of governance and demos need to be considered in conjunction with the issues of legitimacy and effectiveness of security measures. The adverse impact of counter-terrorism on democratic principles and governance or individual rights and civil liberties undermines both the legitimacy and the effectiveness of the policies. The scope and impact of counter-terrorism clearly requires both a national and a transnational perspective to be able to explore these measures in the global context.

CT measures are not inherently undemocratic, but the relationship these measures have with democracy depends on the ways in which fundamental democratic principles and values are understood and defined. On the other hand, the ways in which CT measures and their role in the protection of democratic values and principles are constructed and presented in political and policy discourses can change the meaning of democracy in potentially radical ways. Rights and liberties may become subordinated to the value of security.

This leaves us with the questions of how democracy should be conceptualized within the EU and what implications such an understanding should have for the legitimacy, effectiveness and impact of the CT law. Many of the challenges discussed in this report are not unique to counter-terrorism measures, but are related more generally to the democratic deficit of the EU. But in some respects the impact of CT measures on the democratic principles and system may be unique. Because terrorism is understood as the greatest threat to democracy, CT measures are legitimized in terms of the protection of the very existence of the democratic system and its people. The transnational character of the threat and the absence of clear definitions help to legitimize recourse to expert knowledge, to trans-national responses and trans-boundary networked governance, and to secrecy and emergency measures. These modes of governance position CT measures beyond the reach of democratic accountability mechanisms and sever the link between these measures and the authorization given by citizens. Thus the principle of autonomy, which is often seen as the core principle of democratic systems, no longer holds.

At the EU level the key challenge is to develop an understanding of what values and principles are being protected by CT policies and measures. The legitimation of CT measures continue to rely on sovereignty related arguments, but at the same time a whole range of supranational CT arrangements are already in

place, despite the alleged EU democratic deficit; thus CT measures and their legitimacy status occupy a unique 'in-between' space. The key challenge then is how to make the EU's CT measures subject to democratic control and to a critical public discourse in order to clarify what and who it is that they are meant to protect. In the absence of such an understanding, claims can be made that can change the meaning and place of democratic principles in the political system of the EU; in this sense, it currently represents perhaps the greatest challenge to the EU's democratic system.

From the discussion above it is clear that insufficient consideration is currently given to the question of democratic legitimacy in the discussion, adoption and implementation of CT measures. The questions of effectiveness and impact cannot be divorced from the question of legitimacy. As argued by Edwards and Meyer (2008 p.20) 'securitization processes need to be made explicit, slowed down or even reversed. Resisting securitization would create the space for more rational, informed and proportionate debates and responses'. This report would join those who argue that more debate is needed on the extent to which these measures protect and are consistent with the core values and principles of a democratic society.

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