

SECILE

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

D4.5

Stakeholder Engagement: Policymaker Perspectives

WP4 Stakeholder Engagement: Policymaker Perspectives

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Executive Summary

SECILE is an EU-funded research project examining the legitimacy and effectiveness of European Union counter-terrorism measures (CTMs). This report presents the findings of interviews conducted with ten European policy makers into European counter-terrorism measures across the core themes of impact, legitimacy and effectiveness and draws upon experience of three case studies: the European Arrest Warrant as it relates to counter terrorism, measures relevant to border control, and measures aimed at the disruption of terrorist financing. Readers of this report should also refer to deliverables 4.1 (Report on perspectives on impact, legitimacy & effectiveness of EU Border Control Databases - Law Enforcement Officers Perspectives), 4.2 (Report on perspectives on impact, legitimacy & effectiveness of Counter-Terrorist Finance Law and Policy - Counter-Terrorist Finance Operatives Perspectives), 4.3 (Report on perspectives on impact, legitimacy & effectiveness of the European Arrest Warrant - Prosecutors and Government Officials Perspectives) and 4.6 (Civil Society Perspective on the Impact, Legitimacy and Effectiveness of European Counter Terrorism Measures).

1. INTRODUCTION & METHODOLOGY

The purpose of Work Package 4 is to conduct in-depth case studies through which the impact of European Union counter-terrorism can be considered and the adequacy or inadequacy of the current analysis and understanding of impact, legitimacy and effectiveness assessed.¹ It includes three diverse case studies focused on the European Arrest Warrant as it relates to counter terrorism, measures relevant to border control, and measures aimed at the disruption of terrorist financing. The results of focus groups conducted with operational end users are documented in deliverables 4.1, 4.2 and 4.3.² The results of a focus group conducted with civil society are documented in deliverable 4.6.³ Additional semi-structured interviews were conducted with policymakers as it was felt that their inclusion in the focus groups would be unfeasible. This additional stakeholder engagement enriches the empirical picture and is presented in detail in this report across the core themes of impact, legitimacy and effectiveness and draws upon experience of the case studies.

Ten interviewees were recruited from a variety of key policy-making institutions across Europe including DG Home, Europol, Eurojust and the Office of the Counter-Terrorism Coordinator to name but a few participants. Taking into account the perspectives, offices and expertise of interviewees, these interviews were broadly structured around the themes of impact, legitimacy and effectiveness and, where appropriate, specific questions relating to the case study areas were raised. The full discussion guide can be found in Appendix 4. Each participant was assigned a number from P1 to P10. Details are available in Appendix 5. The interviews were transcribed and analysed first by reference to the case study areas (i.e. European Arrest Warrant, counter-terrorist financing, and border control), second by reference to the key themes of the study (i.e. impact, legitimacy and effectiveness), and third by reference to framing concerns in EU counter-terrorism (i.e. risk-based approaches, preventativeness, and secrecy).

2. CASE STUDY SPECIFIC COMMENTS

Among the matters discussed with the policymakers who were interviewed for the project were the subject matter of the three case studies, i.e. the European Arrest Warrant, counter-terrorist financing, and border control databases. Although these formed only a part of the more wide-ranging discussions in the interviews, policy makers with particular involvement in these areas offered important insights into the impact and effectiveness of these measures. In general, policy makers who were interviewed did not offer perspectives on the legitimacy of these measures *per se* but rather on legitimacy more broadly.

¹ Full details of all deliverables are available at www.secile.eu

² Cian C. Murphy, Aldo Zammit Borda and Lucy Hoyte, *Report on Perspectives on Impact, Legitimacy & Effectiveness of the European Arrest Warrant - Prosecutors and Government Officials Perspectives* (SECILE Consortium, 2014); Cian C. Murphy, Aldo Zammit Borda and Lucy Hoyte, *Report on Perspectives on Impact, Legitimacy & Effectiveness of Counter-Terrorist Finance Law and Policy - Counter-Terrorist Finance Operatives Perspectives* (SECILE Consortium, 2014); Cian C. Murphy, Aldo Zammit Borda and Lucy Hoyte, *Report on Perspectives on Impact, Legitimacy & Effectiveness of EU Border Control Databases- Law Enforcement Officers Perspectives* (SECILE Consortium, 2014).

³ Rosemarijn Van Der Hilst, *Civil Society Perspective on the Impact, Legitimacy and Effectiveness of European Counter Terrorism Measures* (SECILE Consortium, 2014).

2.1 European Arrest Warrant

Impact of the European Arrest Warrant

From the ten policy-makers and high-level operational actors in European institutions interviewed for SECILE, a small number made policy-related reference to the European Arrest Warrant. In these cases, the impression of the European Arrest Warrant was largely positive by reference to its original policy objectives. In particular, they emphasised that the introduction of the European Arrest Warrant had succeeded in both speeding up extradition as between member states and in contributing to the development of a European Union judicial space and coordination of arrests across states.

Speed

Prior to the introduction of the European Arrest Warrant, delays experienced in securing extradition between member states were a cause for policy concern. In particular, P4 noted that prior to the introduction of the European Arrest Warrant extraditions even in cases of very serious crime could sometimes take significant amounts of time: in one case, she said, “it took two countries, Italy and the UK, exactly 10 years to surrender a terrorist from Italy to the UK”.⁴ In contrast, the European Arrest Warrant is “a very quick instrument to surrender normally high calibre criminals, including terrorists”.⁵ Similarly, P6 noted that “[b]efore there was the European Arrest Warrant it could sometimes take decades to have somebody extradited between countries of the European Union and now with the European Arrest Warrant it can be two weeks so there you see...a real change.”⁶

A European Judicial Space

As well as impacting on the amount of time an extradition could take between member states, P6 emphasised the need to see the European Arrest Warrant in a broader context and, in that way, to recognise that the implementation of this instrument had contributed to better coordination between member states and the development of a European judicial space. In this respect, and “by the creation of EUROPOL, EUROJUST you create channels for formal and informal cooperation among the practitioners which also obviously build[s] the trust and then you have the training across Europe through the European judicial training network and CEPOL etc and you create more and more tools. You get more and more used to cooperating together.”⁷ The European Arrest Warrant was thus perceived as having contributed to this process, which was considered to be part of its impact.

Related to this is the impact of the European Arrest Warrant on the coordination of arrests across a number of states, which can be facilitated through Joint Investigation Teams working through and with European institutions such as EUROPOL and EUROJUST, which is considered under effectiveness below.

⁴ SECILE/IV/4/pg.1.

⁵ SECILE/IV/4/pg.1.

⁶ SECILE/IV/6/pg.1.

⁷ SECILE/IV/6/pg.1.

Effectiveness of the European Arrest Warrant

Assessment of Effectiveness: A Quantitative Exercise?

Although the interviewees did not clearly distinguish between impact of the European Arrest Warrant and its effectiveness, one interviewee—P3—noted that a quantitative analysis of the effectiveness of the European Arrest Warrant ought to be relatively straightforward: “the fact that you can say...we have arrested so many people because they were under a European Arrest Warrant [makes it] easier...because every time someone is check[ed] and there is a measure to be taken against this person there is a specific report or this is reported somewhere and then you have, you can have in this case you can have figures about the use of the system”.⁸ Similarly, and in respect of assessing the European Arrest Warrant’s effectiveness, P6 noted that as it is a criminal justice measure the statistics on the instrument’s use are public: “In the law enforcement criminal justice side you have the statistics, you have x amount of arrests, you have x amount of prosecutions. I mean I guess that is easy isn't it?...[It] is out in the open so it's not...difficult to see”.⁹ P5, however, sounded a cautionary note as to the usefulness of simple statistical analysis in assessing the effectiveness of a measure. He remarked “if we say we count all the arrests in order to see if we are efficient with our policies then it is wrong, because the phenomenon of terrorism is different in each and every country and the people there based on social historical involvement in different countries”.¹⁰

Inter-state Coordination in Arrests

As mentioned above, P4 highlighted the contribution of European Arrest Warrants to cross-state joint exercises when asked about understanding the effectiveness of the instrument. To this end, she relayed the following example:

“An example I mention very often is the one on the financing of terrorism in Milan. Starting with trafficking and forged documents, THP, trafficking human beings and nothing to worry. But then sudden we see that this money is meant to be transferred to Algeria and from there to an Al Qaida network and that, those who are ensuring the channelling of the money to Al Qaida are spread over to four different countries: Portugal, France, Romania and the UK. So we were asked in 2007 to draw the simultaneous, synchronised execution of those European Arrest Warrants which were issued against more than 30 persons. We were sitting together with the four competent countries that I just mentioned, the representatives were scrutinizing the European Arrest Warrant issued by Italy. What was meant to happen in one day took us five days because we realised the form, the content, there was not always the one which was required for having an effective execution. And after five days of sending back and forth the European Arrest Warrants to Milan, we managed to have a solid documents and one small thing is execution in the four different countries....[This

⁸ SECILE/IV/3/pg.9.

⁹ SECILE/IV/6/pg.13.

¹⁰ SECILE/IV/5/pg.1.

example] can illustrate a lot of things. You need to cooperate, you need to have instruments which are offering you quick responses and EAW is such an example”.¹¹

Policy makers and officials in European institutions were not, however, uncritical about the European Arrest Warrant and recognised that a review of its operation may be timely. In this respect, P4 opined “... we think that there might be a need for review of the European Arrest Warrant and there are now working groups that are in place and the European institutions that are verifying if there is a need for changes, modification, after ten years of the use of this instrument, the European Arrest Warrant. And I feel it’s a sort of thing, what is the experience over the last ten years, positive, negative and what is negative should be levelled up to something which is acceptable and positive.”¹²

Legitimacy of the European Arrest Warrant

Although the policy makers interviewed did not reflect on the legitimacy of the European Arrest Warrant *per se*, they all offered some perspectives on the meaning of legitimacy in the context of counter-terrorism at EU level. In this respect, a number of themes emerged, all of which may be applicable to a legitimacy analysis of the European Arrest Warrant. These were legality, process and mandate, purpose, and oversight.

Legality

All of the interviewed policy makers who addressed the European Arrest Warrant considered legality to a key element of legitimacy. P6 also noted the importance of legality to an analysis of legitimacy: “[i]t has to be in line with the rule of law”.¹³ For P6 however mere legality is not sufficient: “[l]awfulness is not enough. It’s a necessary component but it’s not enough. It has to be perceived as legitimate so I think it has to be perceived as necessary, as proportionate, as fair as not unfairly targeting people”.¹⁴ P3 expanded on the concept of legality in this context:

“I would say the law should be legitimate also I mean to be compliant with constitutional principle. Because sometimes I’ve seen it with law enforcement authorities and...they say ‘yes we have a law and in the law we are allowed to do that’ but the law was not at all in compliance with the European Convention on Human Rights ratified by the country having adopted this law, so [] then you have a law but the law is not...’legitimate’”¹⁵

For P5, legality was a *sine qua non* of legitimacy: “it must be normally always, with no exception, lawful”.¹⁶

¹¹ SECILE/IV/4/pg.1-2.

¹² SECILE/IV/4/pg.2.

¹³ SECILE/IV/6/pg.5.

¹⁴ SECILE/IV/6/pg.5.

¹⁵ SECILE/IV/3/pg.7.

¹⁶ SECILE/IV/5/pg.12.

Process and Mandate

For P4, legitimacy requires but goes beyond legality; in this context, P4 represents legitimacy as being closely connected to clarity of mandate and tasking, the process through which the measure was delivered, and the purpose for which the instrument is used. P6 also reflected on the role of process in legitimacy:

"Things are often moving very slowly and it is very difficult to find a consensus. So we never really take measures [quickly]. It always takes a lot of time and a lot of players and a lot of different interests. A lot of people say 'oh it's just compromise' or 'it's weak' but then in your sense it's also a strength because what you come up with is when everybody is convinced you need it you do it and it often takes years: the impact assessment and the papers, the white papers, the communications until people make a proposal and...then a lot of outreach with stakeholders, a lot of outreach with civil society"¹⁷

P3 also noted that the process in relation to which the instrument was introduced may be relevant: "It's not because you have a law that it's lawful depending on how the law was adopted, by whom, under which processes".¹⁸

Purpose

For some policy makers the purpose for which the instrument is used may be relevant to a legitimacy analysis. In that respect, however, there was some divergence in whether a prosecution was fundamental to legitimacy. P4 noted that the fact an instrument does not lead to prosecution does not necessarily mean its use was illegitimate:

"If it is not legitimate it will not lead to a solid trial case and you will not be very effective in bringing a presumed suspect terrorist to judgment. It might have saved lives, and this is then a good and noble cause, and if that is the case...then OK, there is no trial case, no conviction and this is not, at least for me as a person, and as a prosecutor has never been a big deal. It's about saving lives...that is a primary concern"¹⁹

Oversight

For P7, all of the above elements are relevant to a legitimacy analysis together with the availability of oversight:

"A measure would be legitimate if there, well first of all if they passed the test of necessity and proportionality, if there is adequate democratic oversight you know all

¹⁷ SECILE/IV/6/pg.6.

¹⁸ SECILE/IV/3/pg.7.

¹⁹ SECILE/IV/4/pg.4.

the necessary checks and balances, if there has been proper democratic or parliamentary process for adopting legislation, if there is adequate judicial oversight, I mean proper means of redress, so all the normal mechanisms in any democratic society".²⁰

2.2 Counter Terrorist Financing

Impact of EU CTF Measures

Of the ten policy makers interviewed, a small number made reference to the EU's counter-terrorist financial disruption system. In this respect, a number of points relating to the policy impact of the system were raised. These related to (i) the implication of listing from a criminal law perspective, and (ii) the policy implications of allowing a suspected terrorist to be represented in the listing decision.

Implications of listing: criminal law

P6 claimed that subjection to the financial disruption regime does not necessarily indicate that the individual in question has been engaged in *criminal* activity, but rather has a broader import:

"You can ask what is the impact and sometimes I have the impression that it's misunderstood by third parties what actually...the [listings] mean because...in some of the member states it's not a constitutive element for a criminal conviction whether it's listed or not you can still you can still prosecute them for terrorism so and that the legal impact of the listing is sometimes misunderstood. But it's a political signal"²¹

Policy Implications of Suspect's Representation

Related to, but distinct from, the above, P5 questioned the rationale of allowing a suspect terrorist to be represented in decisions as to listing if the listing decision does not have criminal justice implications:

"The listing process, how it takes place; you have to bring forward evidence. All member states have to agree, for the European List... So, on the operational side, you say it's a strong statement if someone is on the terrorist list, and the suspicion is really high that it is really a terrorist. And we had several European court cases on the hearing of the person himself, being put on the list, the right. (...) In my opinion we do not come to the right conclusion. Either it is the support instrument for the law-enforcement investigation or it is an administrative measure, but to hear the suspect, the person himself, doesn't make sense"²²

Effectiveness of EU CTF Measures

P4 noted that investigations relating to terrorist financing can be extremely complicated: the networks involved are themselves complex which can make it difficult to identify financing

²⁰ SECILE/IV/7/pg.5.

²¹ SECILE/IV/6/pg.2-3.

²² SECILE/IV/5/pg.5-6.

strategies, processes and pathways. In this respect, counter-terrorist financing instruments can arise for use based on the unanticipated emergence of relevant fact scenarios in other investigations. In this respect, P4 offered the following example:

"Starting with trafficking and forged documents...then sudden we see that this money is meant to be transferred to Algeria and from there to an Al Qaida network and that, those who are ensuring the channeling of the money to Al Qaida are spread over to four different countries: Portugal, France, Romania and the UK"²³

Added to this, P4 noted the difficulty of proving the intent or purpose of money which may have been collected in a legal manner: "How do I prove that what has been started in a legal way is meant to sponsor terrorist activity? And that is something which is difficult to prove".²⁴ Notwithstanding this complexity, P4 noted that "[w]henver we see that legal or illegal activity is meant to sponsor terrorist activity... then we're absolutely in the preventive scene and context and scenario".²⁵

Legitimacy and EU CTF

The interviewees in question did not generally directly address the legitimacy of the EU's instruments for the disruption of terrorist financing. The view of P5, outlined above, that hearing the suspected terrorist when deciding whether or not to subject him to financial disruption "doesn't make sense" might be thought to suggest that the system is illegitimate in some way.²⁶ However, that is not clearly discernible from the interview and an equally plausible reading would be that while the instruments and systems *per se* are legitimate, the process by which they are administered is not.

Regarding data-protection concerns that might arise in relation to terrorist financing and the instruments designed to disrupt it, P3 noted that questions such as "[W]hat kind of data do you want to collect? What will you do precisely with this data?...raised also a lot of concerns...for...necessity, proportionality", suggesting that necessity and proportionality are considered elements of a legitimacy analysis in this context.²⁷

In this respect, the suggestions in relation to legitimacy of financial disruption instruments *per se* that arose in the interviews map on well to the broader conceptions of legitimacy offered by these participants. From this we can conclude that relevant elements to an analysis of legitimacy were legality, process and mandate, purpose, and oversight as outlined in relation to the European Arrest Warrant above.

2.3 Border Control

Impact of Schengen Information System

Of the ten policy makers interviewed, a small number directly addressed the Schengen Information System (SIS) and its policy implications. In this respect, the SIS was seen to have policy implications as regards (i) ameliorating risks arising from the Schengen travel area, and (ii) providing a supplementary tool to domestic systems, although interviewees also noted that SIS is (iii) not perceived as a counter-terrorist measure.

²³ SECILE/IV/4/pg.1.

²⁴ SECILE/IV/4/pg.9.

²⁵ SECILE/IV/4/pg.4.

²⁶ SECILE/IV/5/pg.5-6.

²⁷ SECILE/IV/3/pg.9.

A number of interviewees raised the matter of terminology in relation to information databases used at borders. Rather than conceiving of these technologies and their operation as 'surveillance', interviewees preferred to use the terminology of 'border control'. For example, P9 remarked as follows:

"States...don't keep databases of data about border surveillance. They might keep information about how many detections they have, but they don't keep a database of information that's gathered directly by automated surveillance systems at borders. What they do gather databases on is the number of people coming through border crossing points and providing their documents or not. That is kept on a regular basis. So actually that is perhaps what you should be looking at. Its border control data not border surveillance data"²⁸

Ameliorating risks from the Schengen travel area

P6 noted that the SIS responds to risks that arise when a common travel area is introduced. She explained that "the impact of the Schengen area is that [] criminals can travel freely and that therefore...purely national tools in policing and criminal justice, are not enough".²⁹ Thus, the pertinent border for Schengen member states is the 'external' Schengen border itself, so that a transnational border control tool such as the SIS ameliorates a risk that arises from the policy decision to have a common travel area of this kind.

Supplementing domestic systems

Although the SIS is responding to an implication of a cross-state policy decision, whether or not to use it remains a matter of national discretion and rather than replace it *supplements* national systems. In this respect, P6 noted "As a police officer you don't have to put your suspects in the SIS but if you do maybe if they travel around you get hits in other countries so it's more an additional tool for you".³⁰ As reflected on further below, P10 notes that the discretionary nature of SIS means that "it's really a member states' tool and dependent on to which extent they are using [it]".³¹

Not a counter-terrorist measure

P10 noted that the SIS is not considered by member states as a counter-terrorist measure *per se*: "I don't think it was designed for as a tool to counter terrorism...I don't think that those responsible for countering those activities really consider Schengen Information System as their tool...They rather find their own ways for dealing with the things ideally on a bilateral basis and they still try to avoid as much as possible putting the information out there so that the others could see it and somebody could be hacking and all that".³²

Effectiveness of SIS

Discretionary nature of using SIS

A number of the policy makers who addressed SIS raised questions of effectiveness relating to the discretionary nature of entering information in the system. P10 noted that the fact that states are not required to insert information into the SIS and rather do so at their own discretion may be said to give rise to a weakness, namely a lack of uniformity in the extent to which states use it: "it's really a member states tool and dependent on to which extent they

²⁸ SECILE/IV/9/pg.4.

²⁹ SECILE/IV/6/pg.10.

³⁰ SECILE/IV/6/pg.10.

³¹ SECILE/IV/10/pg.3.

³² SECILE/IV/10/pg.8-9.

are using so that's the uncertainty (...) Some are using [it], some are not using [it] so that's the problem there as a tool at EU level".³³

Effectiveness as Quantifiably Determinable

P3 opined that it is relatively easy to determine the effectiveness of the SIS due to the practical structure of the system. Once information is entered onto the system a prescribed action is required, so that effectiveness in terms of taking the prescribed actions can be measured:

"I think it's easier to assess about effectiveness because the Schengen system is about a measure to be taken by the law enforcement authorities so when you check this person this is what you have to do so it's easier to check it's a bit more about intelligence and I agree it's a bit more difficult to assess but the fact that you can say yeah we refused entry to this many people and we have arrested so many people because they were under a European Arrest Warrant it's easier to because every time someone is checked and there is a measure to be taken against this person there is a specific report or this is reported somewhere and then you have, you can have in this case you can have figures about the use of the system".³⁴

Despite the argument that SIS is relatively easy to measure in terms of effectiveness, P10 argued that it is not effective *as a counter-terrorist tool* but qualified this claim by explaining that counter-terrorism was never the purpose of the SIS, which was designed as a border management system:

"No I don't think it has been effective. I don't think it was designed for as a tool to counter terrorism. It is there to manage to help with border management and movement of people... I don't think that those responsible for countering [terrorism] really consider Schengen Information System as their tool...For me the way that this is fitting with my personal impressions is that it's not really perceived as a tool and discussions that I've had is it's not really in the radar and it's not really used and appreciated...that way. I think that is also what is there in the radar is that border management in general is not really seen as border management having a lot of uses also in counter terrorism but in the EU I think we are just in the very beginning"³⁵

Legitimacy and SIS

The policy makers interviewed did not expressly address the legitimacy of SIS, although P10 noted that it is a relatively simple instrument that allows for decisions to be made purely on the basis of uploaded information and without reference to risk-based analysis or algorithms:

"So the only way this SIS works is personal data and then either you put there a flag that this is someone that has to be stopped and then detained because there is a warrant after the person or then there is this request for discreet surveillance. So that you should let the person go through but you have to notify the authorities. So these are two scenarios. So there is no risk based approach to my understanding existing at EU level currently"³⁶

³³ SECILE/IV/10/pg.3.

³⁴ SECILE/IV/3/pg.9.

³⁵ SECILE/IV/10/pg.8-9.

³⁶ SECILE/IV/10/pg.3.

A number of interviewees also discussed the Eurosur database. P9 focused on the Eurosur system, describing in detail how it works as a border management information exchange system:

"There's a lot of confusion surrounding Eurosur and what it does and what it doesn't do. The majority of member states have surveillance systems at their green and their blue borders, automated or semi automated surveillance systems because there was a lot of funding for that via the European borders fund for many years it was all about infrastructure. So they have all the kit. They have you know radars and thermal cameras and some of them have more fancy stuff but that just provides you with a picture on a screen or a ping in the darkness in a control room. Then what happens is you know a person has to react. And they go out and see what caused the ping and they either arrest somebody or they don't. But the data provided by those systems doesn't get stored. It will be discarded. It might be stored briefly and it's not sent anywhere only nationally. Its sent to the NCC, the national control centre. What Eurosur is about is to make sure that a) all member states have a national control centre and that they have a node so that data of varying types can be sent securely to other member states and Frontex. Frontex is not the centre of this. Frontex is one node in the network. And it's a series of bilateral agreements between Frontex and countries and what they want to share with each other. What type of data that states are willing to share what varies according to national legislation. (...) Frontex buys the nodes and sets them up. And it is itself a part of the network but not the centre of the network. And it is not a hub and spoke it is a network and they input their risk analysis data, the data that they have at European level into the system so that its available to all member states online so to speak. Then other states depending on the national legislation can also input data. It's supposed to be data about, it's supposed to be basically surveillance data or incident related data"³⁷

Information is uploaded to Eurosur from a variety of sources, both open and closed. The extraction and distillation of this information then allows for a critical judgment to be made on whether to respond and who should be responsible for the response.

3. General Reflections on 'Impact' in EU Counter-Terrorism

Predicting and understanding the impact of any counter-terrorism measure is recognised as a key element of providing the evidence base for political decision-making within the EU.³⁸ In this context, however, impact is not well defined. While the Guidelines for undertaking an *ex ante* impact assessment by the European Commission make reference to economic, social and environmental impact, these phrases are vague and the relative weight to be given to them is not clear.³⁹ Ultimately that question of relative weighting may be a political matter when it comes to the exercise of decision-making in respect of whether and, if so, how to pursue a particular policy objective. However, it is also germane in the preparation of impact assessments and the prioritisation of comprehensive *ex post facto* impact assessments once a measure has begun to operate. In this short outline we present key insights into the concept of impact and how it is pursued in the EU counter-terrorist context.

³⁷ SECILE/IV/9/pg.4.

³⁸ European Commission, *Impact Assessment Guidelines*, 15 January 2009, Sec (2009) 92.

³⁹ European Commission, *Impact Assessment Guidelines*, 15 January 2009, Sec (2009) 92.

Who does the measure impact on?

Interviewees considered this question in respect of both individuals and society as a whole. According to the interviewees, understanding the impact of a counter-terrorist measure on an individual necessitates an appreciation of its effect on human rights. A number of interviewees focused on this, often emphasising implications for privacy (reflecting both areas of expertise and topical issues at the time the interviews were carried out). Interviewees recognised that individuals do not exist in a vacuum but rather come together to form communities and societies so that impact can be approached from this perspective also. For the interviewees, considering impact at the societal level entails exploring how counter-terrorist measures affect our democratic values, practices and principles.

3.1 Impact on the individual

A number of interviewees considered impact from the perspective of the individual. This entailed a consideration of the impact of counter-terrorist measures on the enjoyment of individual human rights.

P1 talked about impact on the individual in its totality therefore including impact on one's fundamental rights:

"[W]e are looking at individuals in a society and in a political, legal and constitutional context. So when I am speaking about what is the impact on the person I'm not speaking only of impact in terms of life and limb. I'm speaking of the person in its totality; of its rights, guarantees, all the legal aspects of the fullness of the human being. So obviously fundamental rights are a fundamental part of it"⁴⁰

P2 reflected particularly on privacy issues of the individuals, but noted that the individual is a part of society so that measures taken reflect back the type of society we want to make and remake in terms of our democratic values:

"This... comes back [] to [] our values: ... Do you believe in a society where everything needs to be controlled or is there a certain space where you just accept that it is not...so [impact] has an interrelation [] with [the] democratic values of the society that we believe in"⁴¹

Ex ante impact assessments undertaken by the EU consider impact in terms of economic cost, together with environmental and social impacts.⁴² Reflecting on this, P2 said "we would really have to look into that and give a figure of how much [the measure] costs". Furthermore, P2 noted that "we always have to look at the effect [a measure] will have on fundamental rights."⁴³

The European Data Protection Supervisor's legal officer (P3) approached the concept of impact from a rights perspective:

"I would say from my perspective I would take into account the impact on fundamental rights and in particular on articles 7 and 8 of the EU charter"⁴⁴

She talked about the need for balance and cautions against prioritising security over rights:

⁴⁰ SECILE/IV/1/pg.2.

⁴¹ SECILE/IV/2/pg.2.

⁴² European Commission, *Impact Assessment Guidelines*, 15 January 2009, Sec (2009) 92.

⁴³ SECILE/IV/2/pg.2.

⁴⁴ SECILE/IV/3/pg.1.

"What I would say is that you always have to balance all issue and interests at stake and right to privacy and protection of personal data in particular as we go out to measure and to define counter terrorism are very important to take into account because sometimes just because we want to ensure security to citizens we forgot essential rights and we say yeah but this is so this is an impact you have to take into account"⁴⁵

The European Data Protection Supervisor (P8) began at the individual level and examined how a measure impacts on the individual and then builds up to the macro societal level:

"It would be the individual, individuals, the persons to whom the information relates. But, it's not only the individual perspective, it's very much also the societal perspective. And both the benefits and the negatives we would consider also on a larger scale. So who is to benefit? Who is to...is there any risks? Who will carry the risks? How are these measures, these negatives, compensated and so forth?"⁴⁶

He explored the possibility of negative impacts, mistakes and prejudices:

"[T]here is a big risk of misunderstanding and there is a large room for judgment in practice. And if you do not give sufficient guidance on how this judgment should be exercised, then you are creating a big risk for negative impacts, in different ways. Innocent individuals may be taken for maybe seen as suspicious while they are not. You're also creating lots of negatives for those working on this because there is a lot of noise which distracts them from what they should be doing. And so at different levels there are negative impacts to be considered. And so repeatedly we argue for precision and also for the question of whom are you allocating the risk of all these various evaluations? Who is doing this?"⁴⁷

P9 understood impact in terms of fundamental rights:

"[F]or me the two issues that leap to mind immediately are the effect on border control and the effect on privacy, the privacy of citizens. So border control, you know for obvious reasons since 9/11 has become much more intricate, much more intrusive and invasive to the point that it's become on the one hand a massive business for the states which organise the border control who are attempting to check 100% of the passengers when only you know 0.001% actually have any evil intent"⁴⁸

3.2 Impact on Society

A number of interviewees considered impact from a broader societal level. In this respect, they explored the impact of counter-terrorist measures on democratic values and principles. For P1, terrorism is a crime against society as a whole with significant implications for societal impact values, and people's confidence in the state and in institutions:

"It's a crime against fundamental values, against confidence in the state, in institutions, in the law. So it's a crime against society...And society as a whole

⁴⁵ SECILE/IV/3/pg.1.

⁴⁶ SECILE/IV/8/pg.2.

⁴⁷ SECILE/IV/8/pg.3.

⁴⁸ SECILE/IV/9/pg.1.

includes of course the economy, in some situations the economy - the economic impact - may be determinant as regards the policy measures to be considered. (...)”⁴⁹

In this respect, one of the purposes of counter-terrorist measures can be to demonstrate that the relevant authorities did what was necessary and justified on the basis of what was known or considered likely to decrease risk.⁵⁰ In this respect, P1 noted the importance of the impact of counter-terrorism on public confidence, although that is of course very difficult to measure.

P2 also considered the societal impact of counter terrorism measures. She noted that deprivation or limitations of rights can yield short-term benefits but cautioned that we need to consider the societal consequences of such a choice. Here P2 focused on impact on our democratic principles or our democratic identity:

“So you could say that [] by depriving them of certain rights you would arrive better at finding out more and avoiding certain consequences. But...we are living in a democratic system and in a way we want to uphold certain values. To the extent that you would deprive certain categories of people of certain rights you undermine this idea of a society as we believe in...So [] in that sense when we look at impact we also look at what are the consequences of our legislation [on a] society...which corresponds to our values”⁵¹

This rights-based approach leads her to consider impact in terms of societal values, our conception of society, democracy, freedom and privacy:

“[I]t's referring to law (...) but it's not only that it's also about the kind of society we want to have and it's more than only legal because sometimes we say yeah but if you take this into account and you have all the safeguards in the text it's ok but then the question would be if...we are going more and more towards a surveillan[ce] society and the question behind is ‘is this the society we want to have? Is it the price we are ready to pay for more security?’ And it is of course very difficult to ... assess”⁵²

Considering how impact is assessed, P2 notes that the key questions to be asked are, first, what is the impact on a right? Second, is the impact being imposed for a legitimate purpose? Third, is it necessary? And fourth is there another measure that could achieve the same purpose but interfere with rights to a lesser degree?

From a societal impact perspective, P6 adopted a rights based approach:

“One very important argument for us in our counter-terrorism policy or criteria is that it has to be human rights compliant and rule of law compliant and it has to be fair and without double standards...because if you don't stick to [] human rights and if you are perceived as unfair or with double standards in your counter terrorist policy that can...lead to resentments and that could...lead to radicalisation in due course. And that's why in the EU counter-terrorist strategy we say that human rights compliance is crucial but it's also said in Council conclusions. We are obliged anyhow under the treaties and the Courts....I mean the European Court of Justice or the European Court of Human Rights so in that sense... Charter... rights appl[y] and so on, so in that sense the human rights compliance is not just something that we want but also something that

⁴⁹ SECILE/IV/1/pg.1.

⁵⁰ SECILE/IV/1/pg.7.

⁵¹ SECILE/IV/2/pg.1.

⁵² SECILE/IV/3/pg.1.

we have to do. The CTC strongly believes that the respect of human rights and the rule of law is key to a successful and sustainable CT policy."⁵³

Broadening out the concept to consider impact on specific communities, P6 disagreed that certain EU counter-terrorism measures have led to alienation of communities:

"In terms of alienation of communities I'm not sure that counter-terrorism measures lead to alienation of communities, at least not those taken by the EU. I know that there are studies...about stop and search policies which seem to target specific population group[s] in a [higher] proportion but these are not EU policies and I'm not aware of any EU counter-terrorism policy that would do that"⁵⁴

This raises the important point that at any given time there may be multiple counter-terrorist regimes being administered by a state, and that it is important—while seeing measures in their broader context—to also properly identify which measure is creating the impact that has been identified.

3.3. What are we measuring?

Identifying precisely what is being measured when we measure impact was challenging in the interviews. P8 likened impact to "effects, consequences, positives, negatives and to the extent in which some of those measures -and that happens of course quite frequently- are violating some principles"⁵⁵, but for P7 impact was difficult to understand. She claimed that a practical approach to measuring impact would be "to set the goal...define what your purpose is and then...measure impact against that said purpose"⁵⁶. However, she opined that a challenge to this was that counter-terrorism seems to lack a clear purpose:

"What we notice in counter-terrorism is there is no really there is no defined purpose so that it is impossible to measure impact and everybody—you know all the advocates of more and more and more counter-terrorism policy—they keep saying 'oh but this is useful and necessary and essential' but you know I don't know how we can establish that it is because...many people would say well of course the prime goal of counter-terrorism policy is to save lives but if that is true then counter-terrorism policies are not very effective because we spend a lot of money in order to save very few lives"⁵⁷

3.3.1 Economic impact

Economic impact features strongly in the impact analysis undertaken by the EU in advance of a measure being adopted. In this respect, a wide range of potential economic implications is taken into account. Reflecting on this, P1 gave the example of a cost benefit analysis of an air cargo measure. Cost benefit included "very serious concerns with human life be it only of the crew on board carrying the cargo" but is described as the economic impact of international trade, confidence in air transport and indirect effects in aircraft production.⁵⁸ It can be summarised that "the cost effectiveness of the measure is to a large extent a matter of economic, trade and financial variables".⁵⁹ Factors that need to be considered and balanced include "the cost of the security measure, the financial costs, the non-financial costs, the processing costs, expediency in terms of the speed of the movement of goods and so on and so

⁵³ SECILE/IV/6/pg.3.

⁵⁴ SECILE/IV/6/pg.3.

⁵⁵ SECILE/IV/8/pg.2.

⁵⁶ SECILE/IV/7/pg.2.

⁵⁷ SECILE/IV/7/pg.2.

⁵⁸ SECILE/IV/1/pg.1-2.

⁵⁹ SECILE/IV/1/pg.1-2.

forth. Versus the costs of not applying the measures and having the situation that would disrupt, would destroy, would create direct first, second, [and] third rate impacts".⁶⁰ Economic impacts are tangible and, especially as regards direct impacts, quantifiable. Other impacts such as social impacts, psychological impacts or political impacts are no less important but much more difficult to measure.

3.3.2 Operational / Practical Impact

Interviewees also considered that changes to operations could be considered as 'impacts' of counter-terrorism measures.

Considering this in the context of the European Arrest Warrant, P4 noted how this tool has facilitated faster extradition of suspects. Prior to its introduction, extradition was often slow—P4 pointed to a case of extradition between the UK and France "It took the two countries (...) 11 years, roughly 11 years, to get a high calibre terrorist from the UK to France"⁶¹ to illustrate this—whereas now the EAW operates as "a very quick instrument to surrender normally high calibre criminals, including terrorists."⁶² The idea of such a before/after analysis from an operational perspective is also endorsed by P10⁶³ and P6.⁶⁴

In terms of the operational impact of a measure, P6 stressed the need to contextualise a measure effectively, including by reference to the practice around its implementation, in order to understand its operational impact:

"[I]t's obviously very important to look at the legal opportunities that are offered if it's a measure that's grounded in the law but then you have to look at how is it used, what is the acceptance, is it positive, sometime always you have the tools but they are not being used. Part of this is a problem for example with the SIS which I know is one of your research areas so...what you need in addition to the legal tool is the awareness raising; it's the practitioners knowing what would it be useful for. And you need also the trust. You need the trust to really want to [use] it"⁶⁵

She drew on the example of a database to illustrate this point:

"[W]e have the possibilities of a database. It doesn't mean the member states put the data in. So creating the database isn't enough for the impact. Impact comes when you have a shift in the mind-set; when you have trust enough to put [information] in and when you believe it will help you if you put your information in there and not just work bilaterally"⁶⁶

As well as this, there is an impact on those actors tasked with operationalizing EU counter-terrorism measures. As P2 opined:

"Obviously everybody who has to carry out [a task under a counter-terrorism measure] who has some kind of obligations, is impacted in a way..."⁶⁷

⁶⁰ SECILE/IV/1/pg.1-2.

⁶¹ SECILE/IV/4/pg.1.

⁶² SECILE/IV/4/pg.1.

⁶³ SECILE/IV/10/pg.2.

⁶⁴ SECILE/IV/6/pg.1.

⁶⁵ SECILE/IV/6/pg.1.

⁶⁶ SECILE/IV/6/pg.2.

⁶⁷ SECILE/IV/2/pg.2.

3.3.3 Impact on level of security

The idea that enhanced security might be an impact of a counter-terrorist measure or set of such measures was raised by P2:

"[T]he impact has to be measured against the goals...: do we make our societies more secure? Do we achieve - by the different measures we adopt and the implementation of which we monitor - a more secure Europe? So that would be for me the impact we would have to look into; I mean the primary impact would be that that we have a secure Europe."⁶⁸

In this respect P2 considered it is important to question whether, through these measures, we have created an environment—a framework (including a legal framework)—for making Europe more secure.

3.3.4 Diplomatic Impact

One interviewee opined that EU counter-terrorism might have a difficult-to-measure but important diplomatic impact. In this respect, P6 gave an example of EU contributions to debates on domestic legislation in the United States. This political advice had direct diplomatic impact as the US recognised the concerns of the EU.

3.4 When and how do we measure impact?

3.4.1 The tools we use - Impact Assessment

Interviewees noted that impacts can be difficult to measure and might need to be assessed through various mechanisms. P1, for example, noted that in some cases impacts cannot be easily identified because doing so may require access to classified information, for example. In such instances, where access is simply not available, it is suggested that alternative mechanisms for assessing impact are used, such as the sharing of experiences within groups like the terrorism working group, the peer review mechanism and mutual evaluations.⁶⁹ Furthermore, P2 argued that indirect impacts must be identified and measured where possible in order to inform future decision-making:

"I think it has already a value to flag that there are indirect effects, [that] they are more than negligible and that these effects may also have links back to other things... [S]ometimes you may not even think about certain kinds of impacts because you are very operational and very concrete so the flagging function would already be good. Then you may take this into account and the broader proportionality assessment...may guide your thinking and decision-making process "⁷⁰

At present, impact is largely assessed prospectively through an *ex ante* impact assessment and then latterly by means of *ex post facto* assessments. One of the questions that arose in the interviews is whether impact should be measured by reference to the same referents in both of these exercises. P2 considered that it ought to be:

"I would think that...you would look at the same things kind of to check whether...what you anticipated and what you assumed when you proposed a certain measure actually turned out to be correct"⁷¹

⁶⁸ SECILE/IV/2/pg.1.

⁶⁹ SECILE/IV/1/pg.5.

⁷⁰ SECILE/IV/2/pg.3.

⁷¹ SECILE/IV/2/pg.3.

That said, P2 did see that there might be a value in incorporating more perspectives in the *ex post facto* assessment:

"When we would make an impact assessment ex-ante, we would have to identify who was relevant and normally you would have the same people...afterwards. But...it's always possible that you perhaps didn't think about one sub-category of stakeholders who all of a sudden you realise...could be relevant...I can't really exclude that."⁷²

The question of what such impact assessments actually produce, or ought to produce, in order for impact to be identified arose in the interview with P7. In this respect, she argued that she would like such assessments to produce "facts, evidence"⁷³:

"You know I'd like to know for example when a new counter-terrorism measure is proposed, I'd like to know if...we have any evidence for the necessity of this measure? In other words has there been situations for example where intelligence services or police or judiciary did not have the powers or the means that they needed to fight terrorism. And we never get that evidence cos it's not there."⁷⁴

In spite of the lack of such evidence in some cases, P7 claimed that proposals succeed because "there is a kind of mass hysteria and people do not take rational decisions anymore. That is not counter-terrorism only but we take wrong decisions all the time and counter-terrorism is an area where people are being so spooked thinking there is a terrorist on every street corner that any measure, any measure is to keep us safe which is rubbish".⁷⁵

3.4.2 The role of policy making processes in measuring impact

In order to understand the impact of a policy, we need to understand how that policy is made. A number of interviewees expressed concern at elements within the policy-making process. First, P5 noted that the reality of security and insecurity is not uniform across all member states, but that the nature of the EU requires a harmonious approach across the member states, which makes effective policy-making very difficult:

"I think in general the problem of what we have with EU policies is that... the EU has an umbrella function. So that it has to fit in Malta as well as in Ireland and in Estonia. That is a difficulty."⁷⁶

Thus, although every country and its experience of terrorism is different, EU policies and measures must be developed in a way that fits all. This approach means that the detail required to address the original problem may become diluted in order to produce a measure or proposal that is satisfactory to all of the member states:

"[T]he political discussion struggles sometimes because it has to be agreed by all and based on that you move the measures up to a common agreement, so they are not as detailed as we would like to develop them for one problem which we have in one region of the European Union, but they have to be applied for all"⁷⁷

In this respect, P6 also noted that impact will vary depending on the starting point, i.e. the existing legal framework, history and experience of each individual country:

⁷² SECILE/IV/2/pg.4.

⁷³ SECILE/IV/7/pg.3.

⁷⁴ SECILE/IV/7/pg.3.

⁷⁵ SECILE/IV/7/pg.3.

⁷⁶ SECILE/IV/5/pg.1.

⁷⁷ SECILE/IV/5/pg.1.

"In member states which had long experience with terrorism [EU counter-terrorism] ...maybe [had] an impact around the margins but obviously it's good now to have a level playing field with everybody. So, that said, sometime[s] you have one measure that has a different impact in different member states"⁷⁸

For other interviewees it was important to take into account the role of various (vested) interests in policy-making processes when considering how we might predict, measure and understand impact. In this respect, P7 suggested that we begin the policy-making process with an acknowledgement of strategic interests or, as she said, "who benefits because there is a whole industry behind it."⁷⁹

4. General Reflections on Legitimacy in EU Counter-Terrorism

Interviewees almost uniformly considered that legitimacy was a complex but important concept in the context of EU counter-terrorism. A number of suggested definitions were proposed during the interviews. P8 suggested that

"[L]egitimacy is a general concept, it does not necessarily depend on law being accepted by parliament or by government regulatory measures, but they are sources of legitimacy. Legitimacy also requires things like transparency and accountability."⁸⁰

P2 added "it's always linked to a democratic process."⁸¹ P3 agreed with the idea of a democratic process bring an important aspect of legitimacy, adding in that "you need transparency first about what you do."⁸² The most comprehensive definition of legitimacy suggested by the interviewees incorporated legality, due process and something that extends beyond law into the area of morals and ethics:

"[L]egitimacy is compatibility with the charter for fundamental rights with primary law, compatibility with the secondary law, it's due process and then there is a realm which goes beyond which goes into the moral, into the ethical, into the...ratio between transparency and secrecy in society"⁸³

P6 agreed with this idea of something that extends beyond the law:

"Lawfulness is not enough. It's a necessary component but it's not enough. [A measure] has to be perceived as legitimate so I think it has to be perceived as necessary, as proportionate, as fair, as not unfairly targeting people. It has to be in line with the rule of law and [this is] one of the reasons...[for] the EU criminal justice approach to the fight against terrorism; that we have not said 'oh terrorism is so special that normal rules cannot apply'."⁸⁴

⁷⁸ SECILE/IV/6/pg.3.

⁷⁹ SECILE/IV/7/pg.2.

⁸⁰ SECILE/IV/8/pg.3.

⁸¹ SECILE/IV/2/pg.4.

⁸² SECILE/IV/3/pg.4.

⁸³ SECILE/IV/1/pg.10.

⁸⁴ SECILE/IV/6/pg.5.

4.1. Key components of Legitimacy

4.1.1 Legality

Interviewees considered legality to be a key factor in whether a particular measure is legitimate or not. In this respect P1 noted the importance of compliance with primary and secondary law and the grounding—to the extent possible—of measures in law. In a similar vein, P5 claimed "my personal opinion is that it must be normally always, with no exception, lawful"⁸⁵, and for P6 "[A measure] has to be in line with the rule of law."⁸⁶ P8 agreed that there needs to be a legal basis for measures and added that the purpose of the measure also needs to be legitimate:

"Data protection is an example where there is a principle that a purpose for which data are being collected should be legitimate. And there should also be a legal basis, so if you go for the various options of legal basis one of them is that there should be a legitimate interest balanced against the interest which may be impacted."⁸⁷

Similarly P3 claimed that

"I would say the law should be legitimate also I mean to be compliant with constitutional principle. Because sometimes I've seen it with law enforcement authorities and the processes they say 'yes we have a law and in the law we are allowed to do that', but the law was not at all in compliance with the European Convention on Human Rights ratified by the country having adopted this law so then you have a law but the law is not...'legitimate'."⁸⁸

Part of the legality analysis engaged with by interviewees related to necessity, proportionality and fairness. For P6, as noted above, lawfulness was necessary but insufficient; a measure also had "to be perceived as necessary, as proportionate, as fair as not unfairly targeting people"⁸⁹

Similar sentiments were expressed by P8:

"[T]he law should have predictability, accessibility, the measure should be necessary, proportionate, there should be special safeguards against abuse"⁹⁰

Thus, compliance with the law was considered a core element of legitimacy by interviewees, however *mere* legality did not constitute legitimacy.

4.1.2 Process Legitimacy

The second aspect of legitimacy that arose in the interviews relates to process. As P3 noted "It's not because you have a law that it's lawful; [it] depend[s] on how the law was adopted, by whom, under which processes."⁹¹ As P1 put it:

"[T]he law must be in itself compatible with all the legal requirements in the measure and the way in which you propose, you develop and you implement it must also be compatible with them."⁹²

⁸⁵ SECILE/IV/5/pg.12.

⁸⁶ SECILE/IV/6/pg.5.

⁸⁷ SECILE/IV/8/pg.3.

⁸⁸ SECILE/IV/3/pg.7.

⁸⁹ SECILE/IV/6/pg.5.

⁹⁰ SECILE/IV/8/pg.3.

⁹¹ SECILE/IV/3/pg.7.

For those interviewed, participation in the decision-making process was an important element of legitimacy. P8 explained this well:

"[I]f you hear that these things happen routinely and the decisions are basically signed off lists, which are prepared at the lower level then, very well, then the legitimacy is not necessarily so very high"⁹³

However, the 'who' varies from case to case. In the case of a measure relating to liquid explosives, an example given by P1, those who participated in the process of policy-development were technical experts with very specialised technical knowledge and appropriate levels of security clearance. They participated in a transparent and objective process, which led to a report on the basis of which a political choice and decision could be made. In another case again given by P1, such as countering radicalisation, those who would add most value as participants would not be experts but would be important community actors such as teachers or mothers.

The gap between policy-makers and operational end users can affect end users' perception of the legitimacy of a particular tool or measure. According to P5, communication within this process might affect perceived legitimacy:

"So the line of communication is, in my opinion, one way. What we have is now... we communicate, or the operational level communicates to the policy level. If we take the EU...everything goes to Brussels, but is Brussels in the field? No. It's given back as policy to a Member States with the responsibility to implement it. So, the policy as such is an agreement of all Member States. You might even not find yourself in this policy, but you accepted it. And you have to implement it now by taking your staff who is going to the field and say 'this is good'."⁹⁴

P6 suggested that there is already a high level of participation within the EU:

"Before the Commission can take a measure they have to do...an impact assessment...Obviously you need the expertise...but then...the thinking gets published. I mean it's never that the measure comes out of the blue:...there's a lot of noise before...so the thing is out in the public and then there is discussion in newspapers...and that obviously has an impact...because who decides measures after all? It's politicians...[So] there is always a debate in the EU because it takes so long...to get the measures approved. There will always be the opportunity for debate... even if it's just in the media...and then obviously...you have discussion among experts which you also need"⁹⁵

P1 argued that where we need to move towards within the EU in terms of participation can be resolved by increased confidence in institutions:

"Key is it the transparency of the process and a justified trust in its quality due to a perception that you have that some committee in the European Parliament has scrutinised the way in which we work and they are happy with it. Perhaps this is not yet the case, perhaps there remains a confidence deficit in democratic control of security policies. But the link between you as a citizen and this mechanism of making

⁹² SECILE/IV/1/pg.9.

⁹³ SECILE/IV/8/pg.5.

⁹⁴ SECILE/IV/5/pg.13.

⁹⁵ SECILE/IV/6/pg.7.

sure that all that we do is in accordance with the norms, and therefore the values, can only be guaranteed if the citizen is reassured by the fact that the Parliament is satisfied that these things are being properly done. If National Parliaments are happy and if the European Parliament is happy and there are trusted mechanisms of democratic control then as a citizen I say I don't want to know what could possibly be better than that"⁹⁶

P3 was of a similar opinion in terms of the need to trust in elected representatives in our system:

"[I]f you have to have a measure you trust the one you elect so you hope they will get advice also from experts and from others before taking a decision because you can't be a specialist in everything so but and if you realise that he didn't do it or whatever you could choose to elect someone else the next time. So I don't know how far you need to go to talk about legitimacy if it's only Parliament comes insufficient we have given them some mandate and of course we hope that they are well advised"⁹⁷

Some questions about process legitimacy may arise in respect of the development of highly technical and technocratic elements of counter-terrorism, which are developed without the same levels of exposure to public debate as the broader political policy that they seek to implement. However, P6 considered that concerns as to legitimacy in such situations are not well-founded as the relevant legal provisions are so detailed that technical implementation is not problematic from a legitimacy perspective.⁹⁸

Concerns about the legitimacy implications of highly technocratic processes are at least partially connected to a commitment to transparency as a key legitimacy indicator. For many interviewees, transparency was considered a critical component. P3, for example, opined: "I think that for the legitimacy you need transparency first about what you do."⁹⁹ However, achieving transparency in a security context can be very challenging. Addressing this, P2 acknowledged that transparency might not be fully possible at the development stage but that this ought to be ameliorated in respect of the outcome:

"[T]ransparency...obviously depends on the sensitivity of the matters you are talking about in terrorism. You wouldn't be able to ask security services to be extremely transparent about their threat assessment and what they plan to do. But...I would think it's important to have transparency at least of the final outcome...[To] a certain extent you could also have transparency in the process of making it. I mean I would think for example if we adopt communications or guidelines...you would think about whether you involved stakeholders and hear their views on something in particular in an area where the Commission does not really have a lot of competence"¹⁰⁰

Addressing this challenge, P3 argued that it is possible to achieve transparency in a layered or nuanced manner, even in a security context. She claimed:

"[Y]ou can be transparent without giving too much detail[]...You can explain what you intend to do. What kind of personal data you will collect, under which criteria and so

⁹⁶ SECILE/IV/1/pg.11.

⁹⁷ SECILE/IV/3/pg.6.

⁹⁸ SECILE/IV/6/pg.8.

⁹⁹ SECILE/IV/3/pg.4.

¹⁰⁰ SECILE/IV/2/pg.5.

on. But you don't have to give the name of... people who will be in our database. But...people should know what could happen with their data. So what are the criteria to have your data processed by the State...Then you are transparent about the framework of the processing."¹⁰¹

Along similar lines, and referring to the Schengen Information System, P6 opined:

"It's not a secret that we have the SIS. It's not a secret how it works etc etc. But...while the tool itself is public, confidentiality is sometimes needed to allow for discussions among policy makers regarding experiences and application in practice."¹⁰²

Should there be a situation in which transparency in the traditional sense might result in the release of information that jeopardised security, P3 argued that it might be possible to build in transparency through the use of safeguards such as supervision by an independent authority.¹⁰³

4.1.3 Legitimacy in the development phase:

Legitimacy is linked to a democratic process and concerns the procedures involved in developing the measure.¹⁰⁴ Who is involved in the development of the measure? Are they democratically elected officials? This was especially important for P7:

"A measure would be legitimate if there, well first of all if they passed the test of necessity and proportionality, if there is adequate democratic oversight you know all the necessary checks and balances, if there has been proper democratic or parliamentary process for adopting legislation, if there is adequate judicial oversight, I mean proper means of redress, so all the normal mechanisms in any democratic society"¹⁰⁵

This is connected to the sense that accountability is an essential element of legitimacy. As P2 put it:

"[L]egitimacy [means] that...you can hold somebody accountable... So I mean if certain laws are adopted then those who have adopted them are accountable...to the Parliament and to the public in general to say how it worked and whether it achieved the objectives"¹⁰⁶

Some interviewees raised concerns about accountability and oversight given the classification of documents system within the EU. P6 raised the issue of the inability to brief the European Parliament in secret, noting that there is a need to be able to do this:

"You can brief them in the open and the CTC regularly goes and briefs them in the open and he is very open with the media [] but what you would also need is some of the security services of the member states to go there and tell them for example...where and how has such a PNR system been useful or where would it be useful... [It] would be important to have more of a security perspective in the Parliament so that people understand...we really need this tool because at the moment you have the data protection community very vocal but the security community...not so vocal and that's

¹⁰¹ SECILE/IV/3/pg.4.

¹⁰² SECILE/IV/6/pg.9.

¹⁰³ SECILE/IV/3/pg.4.

¹⁰⁴ SECILE/IV/2/pg.4.

¹⁰⁵ SECILE/IV/7/pg.5.

¹⁰⁶ SECILE/IV/2/pg.5.

something maybe we can reflect about for the next Parliament. Same for the European Court of Justice. Now the *Kadi* judgment says that [those to be listed] would need to receive the information at least for one of the reasons for the listing. Now if that is a classified document the Court doesn't have rules [on] how to deal with classified documents. Other Courts have. So it's not something that's not in line with the rule of law no. But it's something that the Court has not done yet so we have to develop that."¹⁰⁷

P7 expressed concern about *over* classification and its implications for oversight and accountability and, as a result, the legitimacy of EU counter-terrorism:

"The Commission and the Council have a tendency of just routinely classifying all documents and they do so at the request of the US usually and there has been already a number of rulings by the European Court of Justice saying that you know that the classification goes way too far"¹⁰⁸

For P8 the questions of classification and particularly of not being able to answer questions posed by members or committees of the European Parliament due to the classification status of relevant materials was a matter of real concern:

"I've not been in that position...but I've seen some of the consequences. In fact... happened a number of times that [the] claim was 'this is proportionate, appropriate, legitimate etc.' But then the evidence underpinning this was not presented. The assumption was, and this was claimed a number of times by those who took part in the discussions, that in the Council, national governments being represented there, they were convinced that this was the case. But, of course, the other part of the legislature, and the public at large, did have great problems in accepting that very narrow statement."¹⁰⁹

He continued on that while this situation has serious consequences, strategies do exist to address the issue:

"[T]here is much greater possibility for reporting, oversight, accountability, transparency and the whole bit. So there [are] certainly many mechanisms I know of, where you can get around the problem of classified information. It[] also works in court procedures where there are ways to give...limited access or ways about it. So as such I would not buy the problem. But I see the problem as a big one in practice."¹¹⁰

P8 pointed out that it is important to consider "the possibility that reference to classified information is also hiding a lack of real convincing information. So there is a real problem there."¹¹¹

Furthermore, P6 indicated that there might be a legitimacy aspect to deciding what actors introduce a measure:

"[S]ometimes we don't have the legitimacy to pass certain messages but other people do and so it's also [important] to see clearly where can you be active and where is it

¹⁰⁷ SECILE/IV/6/pg.10.

¹⁰⁸ SECILE/IV/7/pg.4.

¹⁰⁹ SECILE/IV/8/pg.4.

¹¹⁰ SECILE/IV/8/pg.4.

¹¹¹ SECILE/IV/8/pg.5.

better that you let others be active that are probably a lot more effective and a lot more credible."¹¹²

While the pace of development at EU level is slow, P6 saw this as a strength from a legitimacy perspective:

"[It] is also a strength that things are moving very slowly and it is very difficult to find a consensus. So we never really take measures [quickly] like this. It always takes a lot of time and a lot of players and a lot of different interests. A lot of people say 'oh it's just compromise' or 'it's weak' but then in your sense it's also a strength because what you come up with is when everybody is convinced you need it you do it and it often takes years: the impact assessment and the papers, the white papers, the communications until people make a proposal and...then a lot of outreach with stakeholders, a lot of outreach with civil society"¹¹³

4.1.4 Legitimacy in the implementation phase

Following the development phase is the implementation phase and the acceptance phase. The level of implementation may indicate something about a measure's perceived legitimacy because it can suggest a degree of acceptance at domestic level. Thus, when asked about what might indicate the legitimacy of a measure, P5 opined: "The level of implementation at the national level. So...certain EU regulation[s] have to be...transposed ... into the national legal system. And then to see if there is acceptance on the national level from the administrative court level side."¹¹⁴

A number of interviewees considered reviewability to be an important element of considering legitimacy in the implementation of EU counter-terrorism. Part of this is that the measure is understood by the public, that there are civil liberty protections in place and that there is a review procedure in place.¹¹⁵ P7 also mentioned the importance of regular review of measures to evaluate their legitimacy as legitimacy is temporal and can change over time.¹¹⁶ She was critical of the lack of evaluation and openness within the EU. Only two countries engage in evaluation of counter terrorism measures - the Netherlands have an independent committee and the UK has an independent reviewer.¹¹⁷ She called for increased evaluations:

"there should be evaluation both at national level and at European level because it is of course a mix of both. They are national policies and European policies and evaluation as well should be a mix of evaluating national and European policies"¹¹⁸

According to P9 the only way to be effective is to conduct an evaluation:

"To me you can't judge the value of a measure until you've done an analysis of what it is likely to provide you with or if you've already put it in place you should have, at the very least, made an honest evaluation of the outcomes that your output has

¹¹² SECILE/IV/6/pg.6.

¹¹³ SECILE/IV/6/pg.6.

¹¹⁴ SECILE/IV/5/pg.12.

¹¹⁵ SECILE/IV/6/pg.6.

¹¹⁶ SECILE/IV/7/pg.5.

¹¹⁷ Anderson, D., (2014), *Independent Review of Terrorism Laws: Searchlight or Veil?*, Working Paper available at <http://ssrn.com/abstract=2400656>; *Counter-Terrorism Measures in the Netherlands in the First Decade of the 21st Century* available at:

http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2011/CT_Measures_Netherlands.pdf

¹¹⁸ SECILE/IV/7/pg.7.

produced. And that has never been done. It hasn't been done for SIS, it hasn't been done for Eurodac, it hasn't been done for any of these systems."¹¹⁹

An evaluation of outcomes rather than outputs is needed as he pointed out that the field of security is a "sphere for some reason principle rules over evidence. It's policy based evidence making rather than the other way around often in these things."¹²⁰

P8 expressed views similar to P9 and concluded that a form of evaluation is required. For P8, legitimacy is presented as a circular process of consideration, action, reaction, evaluation rather than a linear process:

"Putting it very simply, the fact that a clock is ticking, a bomb is ticking; does it mean that anything would be allowed? But in terms of having to deal with these challenges, then I would be open, for instance, with working with some assumptions, but then subject to confirmation at a later stage. If time is of the essence, you cannot do all the verification before, but then you should do them after. And it should be crystal clear that the answer is negative, then it's still not acceptable. And, so if you have to make a jump from an assumption to a conclusion then the question would be, please look back, how did it work out? Was there any effect at all? And how measures are working in practice is also a way of looking back. If the effectiveness was assumed, but in practice they are not effective, I think then we should look back, go back, and reconsider the measure. So, I see legitimacy as a...circular process if I may put it in this way."¹²¹

He gave the example of the data retention directive and the importance of evaluation:

"This Directive had a history and...once it was adopted it led to controversy on the national level. Parliaments rejected legislation in various member states. In other member states there were legal procedures in Courts, up to the highest courts, some of them annulled or otherwise effected the national legislation from the Directive. And now finally, two constitutional courts, highest courts, one in Ireland and one in Austria have asked the Court of Justice to give a judgment on the validity of the directive. So, in the meantime there has been an evaluation and multiple working groups to see how it works, so there is a wealth of evidence. Against this background I say, it's striking that the evaluation report is actually so weak. And that member states have not been able to contribute from their own experience on the validity of a measure of which many of them claim is so essential. And that is now a real problem: does the evidence not exist? Or are member states keeping this for themselves? Or what is the issue really? I'm inclined to think that there is simply is not enough evidence to underpin this. And my view in 2005 was that it was not acceptable, so you see, I see things in a long distance view. And you asked me 'are there mechanisms?' Yes, there are plenty of mechanisms. And in the end it then leads to an outcome, but if measures are very invasive then that is a problem. We cannot wait seven to ten years until the legitimacy is finally decided. In the meantime it has already done its damage."¹²²

His final point was echoed by P7 who talked about the case of classification "the only way I can challenge that as an individual citizen is if I go to Court and that means like the case that I

¹¹⁹ SECILE/IV/9/pg.8.

¹²⁰ SECILE/IV/9/pg.9.

¹²¹ SECILE/IV/8/pg.6.

¹²² SECILE/IV/8/pg.7.

am involved in now that means litigating five or six years, my costs, I mean that is prohibitive."¹²³

Within the process of evaluation there is a temporal factor to be considered, an idea that was picked up on by P10:

"When you are a looking at the legitimacy you have to look at the society and the context and the particular time and what seems at this time legitimacy, and you are not tolerating any kind of risks but you really want [] everything possible [to be] done to prevent certain kind of things then I think there are not too many people who question legitimacy, but when it feels that we are fairly secure things are fine then you start questioning that very same measure in another time, another place, another context. I think that when any measures are taken they are always risks but perhaps checkpoints that things need to be discussed and reviewed whether it still is meaningful because every measure has its price of course, and at a certain moment you are willing to pay that price and give up certain privacy or rights and so forth, and then at a certain moment that may not look necessary anymore so I think that it is something that is also...something to be kept in mind."¹²⁴

4.1.5 Output as legitimacy

For some interviewees, the output of a measure—or the end result of its application—is a key element in its legitimacy. P5 spoke from the perspective of a police officer and stated that the most important part of the entire process is the output in terms of a prosecution:

"Because at the end of the day you live for your investigation to bring it to prosecution to a court case. And if you don't reach that level you have worked for nothing. And they don't think about policy-making and the different missing points. And that is where on the other side, on the policy-maker level you do not get the agreement or understanding for what the police officer or the intelligence officer on the street is doing"¹²⁵

He explained this perspective on the basis of output:

"At the end of the day you will be measured with the output. And the output is just if you deliver the file to the prosecution to the court. That is the output of a police officer. Or if you look more to the police law, the prevention side of the law, if you fine someone for doing the wrong behaviour, so the prevention side, checking cars, speed controls and all that stuff, that is a way of measuring, so you have a result. With having no court case, you have no result. And that can't be measured. And that is the difficulty for the day to day business of a police officer. You're measured; you're compared for your promotion, what is your output. And that is on different levels and in different states always the same: what is your output? And your output is no court case and it's difficult to describe the output yeah"¹²⁶

In contrast, P4—coming from the perspective of a prosecutor—noted that sometimes achieving a successful prosecution might not be the most important element of deploying a counter-terrorist measure. Rather, for her, that can sometimes be successfully preventing an attack:

¹²³ SECILE/IV/7/pg.4-5.

¹²⁴ SECILE/IV/10/pg.5-6.

¹²⁵ SECILE/IV/5/pg.5.

¹²⁶ SECILE/IV/5/pg.14.

"If it is not legitimate it will not lead to a solid trial case and you will not be very effective in bringing a presumed suspect terrorist to judgment. It might have saved lives, and this is then a good and noble cause, and if that is the case that it's actually was not legitimate, which was not legitimate which was not solidly led by the judiciary then OK, there is no trial case, no conviction and this is not, at least for me as a person, and as a prosecutor has never been a big deal. It's about saving lives and ... that is a primary concern. And having a good solid trial case is not at stake any longer"¹²⁷

4.1.6 Going beyond the law

Going beyond legality and due process, there is a question of legitimacy in terms of moral and ethical considerations. P1 illustrated this by reference to the dispersal of counter-radicalising narratives through the financing of organisations. Such an activity would be legal and therefore would fulfil the criterion of legality. The activity is transparent as finances are accountable and above board. However the activity remains secretive as the message is actually coming from a public authority through a civil society group and this enters into the realm of morals and ethics and raises issues around the tension that exists between transparency and secrecy. Who decides on where the balance between these different interests lies? According to P1 it is a political decision.

"Is it ... legitimate to develop counter-radicalising narratives. I mean you have bad people there who are committing the crime of mobilising young kids to hate and to kill and that is a crime under national law and under the Framework Decision on Terrorism. And they are doing it with narratives. They are doing it with the use of stories and pictures, with narratives of glorifying jihadists and so on. (...) It is perfectly in line with European law - primary and secondary - to develop an alternative narrative, a counter-narrative, to write other messages that aim to neutralise this poison and stop it from hitting the victims. (...) Is it however legitimate to develop such counter-narratives and disperse them as if they were not coming from a public authority? It is certainly legal, but is it legitimate in the widest sense going beyond the lex into the moral round? (...) I would personally tend to think that everything a public authority does needs to be able to be explained to the public and should be explained to the public. (...). Is this legitimate or not? This shows that your definition of legitimacy needs to be carefully considered. If legitimacy means being in line with the law well then this type of activities are legitimate. They are being done not only with the best of intentions but also in a very serious manner with a lot of research going into why are these kids at risk and how can you help them to think in a clear way, to understand what's going on. (...) Legitimacy is compatibility with the Charter for Fundamental Rights - with primary law, compatibility with the secondary law including in terms of due process and then there is a realm which goes beyond that; which goes into the moral, into the ethical realms. As regards terrorism, this often involves the ratio between transparency and secrecy in society"¹²⁸

P4 also goes beyond legality and due process in her consideration of legitimacy. For her, the purpose of the counter-terrorist measure is an important factor in its legitimacy:

"Well I know of a lot of case where we were preventing actions where we saving lives. That is what we're talking about. Where is the borderline for the right of life, or the right for harvesting information intelligence? Never for the fun of collecting

¹²⁷ SECILE/IV/4/pg.4.

¹²⁸ SECILE/IV/1/pg.9-10.

information intelligence. It is always with a purpose. And the purpose is how can we save lives in time? How can we timely exchange intelligence, information and transform into tangible evidence?"¹²⁹

This indicates a relationship between the extent to which a policy or measure seems to speak to a kind of operational need or take into account on the ground reality, and its legitimacy. This includes the perception of legitimacy on the part of operational actors. P5 viewed social perspectives or social acceptance of measures as part of legitimacy, although this factor is susceptible to manipulation by things like the media.¹³⁰

4.2. Measures of legitimacy

When asked how legitimacy can be measured, interviewees tended to lean heavily on legal concepts such as necessity and proportionality. For example, P2 opined:

"[P]erhaps it is a synonym for proportionality...in the sense of we have a problem to solve and the measures we take are appropriate and necessary and in a broader sense proportionate to achieve that...[The] last part of proportionality would then really be what is the scale of the problem, what are the risks, what is at stake and then to see [if] the measures that we have taken [address that]....[I]f it is appropriate it must be necessary so you don't have other means to achieve the same results..."¹³¹

Although a Court may ultimately decide on the legitimacy of a measure when understood in these legalistic terms, the initial decision is, essentially, a matter of political judgement.¹³² The political nature of decisions can be seen for example in relation to the Framework Decision on Terrorism in 2002 and its amendment in 2008.¹³³ The Decision was introduced mainly because the political will existed. Here, as is sometimes the case in counter-terrorism, the particular challenges of counter-terrorism must be taken into account. Even if the same volume and standard of evidence might not be available as may be expected and demanded to satisfy an Impact Assessment in other areas, the threat from terrorism is such that political responsibility may require the introduction of a measure.

The democratic legitimacy of those taking such political responsibility can then lend legitimacy to what might be considered 'political activism'. This activism may be legitimised and justified in an ex-post facto evaluation but is that legitimate?

"[F]or me [] that would not necessarily fulfil the concept of legitimacy....They have the legitimacy of taking these decisions but the reasons why they take these decisions take[] away some of the what I consider the legitimacy, perhaps from a lawyer's point of view, because it may be political activism: you think that in a certain situation you have to act, you have to send a signal to stop this. Maybe that they are right and it sent a signal, which was received by those to whom it was addressed. Perhaps... in an ex

¹²⁹ SECILE/IV/4/pg.3.

¹³⁰ SECILE/IV/5/pg.11.

¹³¹ SECILE/IV/2/pg.5.

¹³² SECILE/IV/2/pg.8.

¹³³ European Union: Council of the European Union, '*Council Framework Decision 2002/475 on Combating Terrorism*', 13 June 2002,(2002/475/JHA), available at: <http://www.refworld.org/docid/3f5342994.html> [accessed 17 June 2014]; European Union: Council of the European Union, '*Council Framework Decision 2008/919/JHA*', 28 November 2008 amending *Framework Decision 2002/475/JHA on combating terrorism*'.

post evaluation I see that indeed it kind of [worked] , but that would only have a light legitimacy for me"¹³⁴

According to P2, the extent or the rigour of the evidence base for a measure is part of the legitimacy analysis, however there are cases in which difficult political decisions need to be taken relatively quickly and without the usual or optimal evidence base having been assembled, which can raise some questions of legitimacy. In this respect, P2 claimed:

"In legal terms you would always ask for absolute proof and evidence but in a political arena you sometimes have to live with less and take a decision and that is part of the game and you may criticise us to a certain extent but I think in some instances just saying I will only take decision if it is based on all the evidence I have and otherwise I won't take a decision, if then something goes wrong I think they would be justifiably...accused of not taking their political responsibilities"¹³⁵

In some ways this highlights the point-also hinted at by P8 and P10-that politics and political processes can be both a mechanism of achieving legitimacy and a challenge for legitimacy. As P10 said:

"[T]he problem areas there is what I see quite often is politicians are calling for quick measures and they want visible measures to send a message out to the public and of course it comes from there and these are democratically elected decisions makers and so and of course in our activities we need to respect that and implement those measures"¹³⁶

5. General Comments on 'Effectiveness' in EU Counter-Terrorism

5.1 Defining Effectiveness

In considering the meaning of 'effectiveness', interviewees tended to relate the concept back to the extent to which a measure meets its declared objective. P2 and P3 both considered effectiveness to be objective-based; for example, P3 noted that a measure is effective "if it has achieved the purpose for which you adopt the measure."¹³⁷ However, objectives may shift and P2 noted that a measure might not meet an original objective but may be quite useful in achieving another one. That then gives rise to something of a dilemma regarding how we conceptualise and measure effectiveness:

"[I]t may be that....you had one objective in mind and then experience shows that... it was ineffective for that objective but...actually it helped do something else and then you think that is equally good...so I mean it may be that the objective may change to a certain extent...but actually it showed its effectiveness in another area and you think that for that purpose alone we could perhaps still maintain it"¹³⁸

¹³⁴ SECILE/IV/2/pg.8.

¹³⁵ SECILE/IV/2/pg.9.

¹³⁶ SECILE/IV/10/pg.5.

¹³⁷ SECILE/IV/3/pg.8.

¹³⁸ SECILE/IV/2/pg.10.

Where this happens there may be some implications for process legitimacy.¹³⁹ Addressing this, P3 noted that where objectives change over time a new assessment ought to be carried out:

"So you have to re-think...to balance again and do the impact assessment as regards fundamental rights, the purpose and balance between them"¹⁴⁰

Although an objective-based understanding of effectiveness was prevalent among interviewees, P8 problematised this approach, highlighting weaknesses within the policy-making process which make defining or measuring effectiveness in this way difficult. He gave the example of the development of an EU-wide computer system to manage the issue of overstayers. The starting point was "we need this big system".¹⁴¹ The issue however was that there was no European policy or harmonisation in the area. He explained how "the measure was developed with a specific purpose in mind, but it was more that the tool was important and the policy had not been developed yet".¹⁴² The purpose evolved from something very specific to "we need to modernise the way we manage borders...So you see there that the purpose moved from something specific, and I take this as an example, to something very general and therefore it makes it more difficult to measure whether the measures are effective or not. And whether they are legitimate."¹⁴³

What is described here is a sort of a disconnect between the original problem, which needed a particular solution to address it, and then what happened in terms of political narrative and discourse. This illustrates the possibility of these phases becoming disconnected so that the solution appears not to actually address the original problem. The repetition of the solution helps legitimise it.

Linking effectiveness to purpose may also be problematic, according to P9, who claimed that the purpose of security measures might not only be to increase security but to increase the *perception* of security:

"What is important in security is not security itself but the perception of security. Perception of security is far more important than security. So you can be as unsafe as you like, you can be in imminent danger of death but if you don't think that you are then it doesn't matter and also if there is absolutely no possibility that anything bad will happen to you but you feel as if you are in real danger then that's what's important and that's why this security theatre that there is at the airports with 100% checks of people who have no malign intent at all, once installed, cannot easily be removed because, though annoying, gives the impression of security, if not the reality." ¹⁴⁴

For this interviewee it was, thus, important to be clear about the objective-whether actual security or the perception of security-as a measure may be effective in one way without being effective in the other.

P10 agreed that effectiveness is linked to initial purpose and adopted a before/after framework of assessment. However she complicated this by introducing the idea of unintended consequences:

¹³⁹ *Id.*

¹⁴⁰ SECILE/IV/3/pg.8.

¹⁴¹ SECILE/IV/8/pg.8.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ SECILE/IV/9/pg.9.

"[T]here was perhaps a purpose but then maybe there was some unintended consequences and maybe the ones who gave the green light did not fully understand what implementation [of] this particular measure would mean...So perhaps the objective was reached but maybe there were some other things that happened that maybe came as a surprise or the value of these other things that had to be sacrificed at the expense of this measures were not fully understood at that time or maybe between them it could be that political decision makers change and their views are different so you might have hit the objectives but perhaps it is seen that...in the end the price is too much and in the end...the cost effectiveness may not be there. And I mean cost effectiveness not just the money but in general perhaps the loss of some rights and some other things..."¹⁴⁵

5.2. Measuring effectiveness - the importance of perspective

One challenge identified by some interviewees in terms of measuring effectiveness was that sometimes a measure might be effective inasmuch as it has prevented something from happening, but it is very difficult to identify when this has happened. As P6 put it: "obviously when you prevent attacks then you might not know that there would otherwise have been an attack so it's very difficult to say."¹⁴⁶

Notwithstanding this, interviewees did identify some measurable indicators of effectiveness. P6 claimed that the development of a comprehensive legal framework relating to terrorism is one such indicator, as is the use of legal measures and instruments in a manner that improves the situation that predated them.¹⁴⁷

From a societal perspective, P6 argued that we might consider the effectiveness of a measure in terms of the wider impact that it has on society and on particular communities within society:

"[T]he EU could say when there are no attacks or when there have been attacks that you react quickly that the society is resilient and doesn't overreact or doesn't stigmatise certain communities. I mean how a society reacts and communities react to attack. [V]ery often you can influence that by having networks in place that allow...the member states, to reach out to communities and frame the response in a way that is not divisive"¹⁴⁸

This societal perspective was also taken up by P1 who explained in more detail how complex the concept of effectiveness really is. The example given by P1 to demonstrate the complexity of this concept is the case of the criminalisation of foreign fighters. Going to fight in Syria is a crime in some member states but not in others. How can we measure the effectiveness of this measure of criminalisation? In countries where it is not criminalised, the absence of legislation it is suggested opens up opportunities for indoctrination and manipulation, increases the probability that people will travel, makes cooperation between countries difficult and prevents Europol from acting. On the other hand, in countries where it is a criminal offence to travel to Syria to fight, the practice of criminalisation may hinder disengagement of youths. Young people who were radicalised and witnessed events in Syria and return to their home state can often be traumatised and ready to abandon violence. If they are criminalised this may slow or block that disengagement. This example demonstrates

¹⁴⁵ SECILE/IV/10/pg.8.

¹⁴⁶ SECILE/IV/6/pg.12.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

the complexity of effectiveness of a measure, which on the one hand could potentially have a deterrent effect by decreasing opportunities for radicalisation while simultaneously having an "anti-deradicalising" effect. Ultimately it is not subject to a clear-cut technical assessment and according to P1 "is only susceptible of being properly appreciated if on a political level."¹⁴⁹

P7 also made wider societal links in terms of effectiveness:

"Terrorism is of course...about undermining democratic society and the rule of law. That's the aim of terrorism. So counter-terrorism should be about preserving the democratic society and the rule of law, making it more robust. The interesting thing is that you know 99 out of 100 counter-terrorism policies are actually weakening democratic society and the rule of law. So also in that respect I don't think that they are very effective"¹⁵⁰

Added to this complexity is the fact that effectiveness changes over time. As a measure is effective, terrorists innovate and identify new routes, opportunities and means. P6 recognised the fact that effectiveness shifts over time and therefore needs to be continually re-evaluated:

"...[implementation of a measure] makes life more difficult for these people and they know they are watched ... [S]mart people, when you put one measure [in place] they will [adapt]...But it doesn't mean that your first measure wasn't effective. It also doesn't mean you can stop with your first measure because soon as you stop with your first measure they will move back...but that's normal that people try to work around restrictions. The more restrictions you put [in place] the more difficult it will be and the easier maybe you catch them"¹⁵¹

5.3 Measuring Effectiveness - the role of statistics

A number of interviewees reflected on the role of statistics and other quantitative data in measuring effectiveness. For P6, statistics are a useful means of measuring effectiveness from a law enforcement perspective: "you have the statistics, you have x amount of arrests, you have x amount of prosecutions."¹⁵² P5 also noted that a statistical report such as Europol's annual Terrorism Situation and Trends Report might be a useful way to assess effectiveness of counter-terrorism *per se*.¹⁵³ However P5 also noted that statistics are subject to manipulation or strategic presentation, including for political reasons.

"What you can easily do is to misinterpret, to misuse the statistics for your own purpose to stress certain things. Or more politically correct, to use them for a good thing. To stress and to get the attention of the political decision makers we still need more money, more human being[s] behind it, and so on. But it's difficult. That is what we face now, since yeah, 2006, 2007. That we always say that the threat is high and that is all what we can say. Because there's so many different on-going things, so people travelling to the North African countries, people now going to Syria. We have certain activities in Russia. What is about the financial crisis, we see anarchist activities increase. And based on what is popular you can sell it with the right things. But to get it always on top of the political agenda is currently very difficult because only if a politician personally is affected by terrorism then you get his attention. His

¹⁴⁹ SECILE/IV/1/pg.7.

¹⁵⁰ SECILE/IV/7/pg.2.

¹⁵¹ SECILE/IV/6/pg.13.

¹⁵² SECILE/IV/6/pg.13.

¹⁵³ SECILE/IV/5/pg.7.

or her attention. And there we miss out. And it's a fighting on resources on budget on other means"¹⁵⁴

Statistics cannot, however, always tell the full story in respect of the effectiveness of a counter-terrorism measure, particularly where the measure in question is intended to allow for early, preventative intervention or capacity building and knowledge sharing between security professionals. In this respect, P5 remarked:

"[T]he the awareness programs where you share best practices to see what is the result. You don't know. But if you reach one who has attended such a best practices conference, and he might have one possibility to go, to do a house search and he finds the right thing, then you have a good, big result. But he will never come back to the policy maker and say 'thank you, you made me aware that I have to look for this specific item or behaviour or whatever'. So it's really difficult to measure"¹⁵⁵

P9 suggested that the most appropriate way to understand effectiveness is through evaluation, but argued that such evaluation must be rigorous and critical:

"The question is 'are we honestly evaluating whether the purpose is being met by the measures we have put in place? Are the things that we are doing actually contributing to that purpose or not? Are they the most effective things that we could be doing?' That question is not being asked"¹⁵⁶

He argued that there is at present an unwillingness to evaluate the effectiveness of security measures:

"For instance border surveillance we don't know how effective it is but we could easily find out, easily. You know if you have a stretch of border say a 100km long and you have a couple of patrols who drive up and down it every night maybe you have some radar or some heat cameras. Frontex mainly gathers data on detections at borders oh yes there were a 108,000 detections last year at European level of people trying to sneak across the border. Yeah but what proportion is that of the actual flow? How many people actually got across? No idea. What? Have a guess. Really we have absolutely no idea. The working assumption is that it's sort of 1 out of 10 but nobody knows and yet it's really easy to test. All you have to do is get together a team of 10 or 20 people and walk them across the border at night at different points of the border to see how many get detected and then you have your, you have an estimate. But nobody wants to perform that experiment. There is no border guard service in Europe which is willing to perform that experiment... Why? Because they are scared of what they will find. If they find that none of those people are detected can you imagine what the repercussions would be for their jobs, for the whole edifice for the whole you know the whole theatre of security the curtain would come crashing down, the emperor would have no clothes"¹⁵⁷

In essence, P9 argued that effective evaluation of effectiveness does not take place in the security sphere:

¹⁵⁴ SECILE/IV/5/pg.7.

¹⁵⁵ SECILE/IV/5/pg.10.

¹⁵⁶ SECILE/IV/9/pg.10.

¹⁵⁷ SECILE/IV/9/pg.10.

"The point is surely that if you have a policy...it's there to achieve an end and the question is you have to evaluate whether your policy is the best way to achieve that end. And that's never done in this sphere, in counter-terrorism and in public security. We do stuff. We have policies that say ok we'll start checking everybody that comes across a border or we'll start looking at everybody's emails or we'll start monitoring everybody's phones. And the question is never asked: 'is that going to do what you want it to do. Is it going to achieve the outcome you want?'"¹⁵⁸

Interviewees working for the European Commission argued, however, that evaluation and review does take place, but by means of a cost-benefit analysis. In the words of P1:

"The effectiveness of the measure is basically the cost benefit between the cost in putting it there all costs economic, financial, non-financial costs in terms of the work flow of the company and so on against the benefits which are also the non-costs of this not happening because if there is terrorism then this company's credibility goes down the drain."¹⁵⁹

In some cases, this assessment is "a very technical, technocratic approach to effectiveness".¹⁶⁰ Based on that, and on his conviction that a more critical approach to evaluation is required, P9 expressed dissatisfaction with the current evaluation mechanisms:

"[The Commission says] they will perform a cost-benefit analysis in regard to any new large scale IT system they will propose but what they actually do is they do a cost effectiveness study. That's not the same thing. So they say yeah we've looked and we think we can do this for basically 700,000 and they leave the effectiveness part as being self-evident. Of course if we set up another massive centralised IT system it will have this effect, it's obvious but that's wrong. It must be cost versus benefit. And it's the analysis on benefit which needs to be done and is not done. I have never seen an example of that being done"¹⁶¹

Within the notion of costs and benefits, he argued, we need to consider the effect on citizens:

"That should be the main thing. Is this thing going to do what you expect it to? And the next second question should be is what effect is it going to have on your citizens? Is it worth it? Also in the cost-benefit analysis in terms of a moral cost-benefit analysis and all that stuff I don't know the right word but I mean is the burden on your own citizens that these measures are going to create are they worth? Do they weight up against the likely effect of not doing something?"¹⁶²

P9 qualified this by saying that this cost benefit analysis must be done against the backdrop of knowledge of the strategic value of the industry to our economy:

'[Y]ou have to be careful because it's not simply 'is it worth it?' because in spending billions of Euros you are also having a positive effect on your economy because you are employing a 130,000 border guards, God knows how many thousand people in

¹⁵⁸ SECILE/IV/9/pg.11.

¹⁵⁹ SECILE/IV/1/pg.6.

¹⁶⁰ *Id.*

¹⁶¹ SECILE/IV/9/pg.12.

¹⁶² *Id.*

supporting industries. You know airport checker, airport security checker is one of the growth jobs of the decade like working at a call centre."¹⁶³

P7 made a similar point:

"[W]e should be a lot more critical about the measures that we take. Many measures that were introduced as counter-terrorism measures are actually used for advancing different purposes. They may be very legitimate purposes but not relating to counter-terrorism. And then as I forgot to say we also need to look at who benefits because there is a whole industry behind it. I'm all in favour of people making money, I'm a market liberal...but at the same time we should know who the stakeholders are. And we know there are many companies, some of which are related to defence industry, the US defence industry who benefit, then I think it's fair to ask the question"¹⁶⁴

6. Conclusions

The interviews undertaken with these key policy makers suggest a number of key insights in relation to the concepts of impact, legitimacy and effectiveness as they relate to EU counter-terrorism.

In terms of impact, it is important to understand the referent. Firstly, *who* are we are measuring impact on? And secondly, *what* are we measuring? This report has touched upon economic impact, societal impact, operational impact, and political impact. There can be multiple levels of analysis as impact can be direct and indirect, national and transnational, uneven, positive and negative. The two key tools for measurement of impact that are currently used are *ex ante* and *ex post facto* assessments. A review of the policy-making process showed that a one size fits all approach may not be appropriate given the diversity across EU member states. Policy makers called for improved communication between the strategic level and operational level. A real issue is not the lack of intelligence but rather the lack of analysis and sharing of that intelligence. There is a tendency to revert to more technology when in fact increased cooperation and exchange would be more effective. Overall in terms of impact it was felt that there is a need to be more critically reflective of the strategic interests at stake and the reality of differentiated impact.

Legitimacy is conceptualised in different ways by the interviewees as process legitimacy and output legitimacy. These different modes of legitimacy are related but may also be capable of discrete consideration. A key factor in legitimacy is the process of review. Legitimacy may be temporally contingent and thus requires regular review at both national and EU level. A distinction needs to be made between outputs and outcome as the legitimacy of one does not necessarily determine the legitimacy of another. Evaluation should be of outcomes not outputs, i.e. of the actual operation of measures rather than of their mere implementation or transposition. Evaluation is needed to ensure that a system is used solely for the purpose that it was developed for and so that any 'creep' in relation to the application and uses of measures can be subjected to a fresh legitimacy review. From the perspective of policy-making, technical experts develop and implement measures in a framework that may not always be subject to the same level of rigour as the broader political framework. In this respect expertisation may cause legitimacy concerns, so that even where technocratic decision-making is undertaken in the counter-terrorist context, broader political accountability mechanisms (re the policy per se) should be operational in order for expertisation not to have

¹⁶³ *Id.*

¹⁶⁴ SECILE/IV/7/pg.2.

a detrimental impact on legitimacy. Participation is key to legitimacy. Participation, consultation and information-sharing are not necessarily synonymous and legitimacy is likely to be enhanced to the greatest degree where *meaningful* participation is ensured either at policy-making or review stages. There is an inevitable tension between transparency and security. Ways of managing this tension are required, perhaps by designing levels or layers of transparency distinguishing between broad policy objectives and narrow technical implementing and design processes. The system of classification within the EU poses challenges to transparency and legitimacy.

At its simplest, effectiveness is understood by the interviewees as the achievement of an objective. This conceptualisation may be complicated by weaknesses in the policy-making process, a deeper excavation of the actual purpose, and the possibility of unanticipated consequences. Measuring effectiveness varies depending on one's perspective and broader purposes or aims. Effectiveness is time bound and needs to be revisited regularly. While statistical analysis of a measure's performance may be helpful in assessing effectiveness, they are neither exhaustive indicators of effectiveness or necessarily objective. The interviews thus suggest that a broader evaluation of a measure's operation may be more appropriate in some cases.

Appendix 1 Invitation to Participate in Research

Dear

I am writing to invite you to participate in an interview as part of the Securing Europe through Counter-Terrorism – Impact, Legitimacy and Effectiveness (SECILE) project.

The aim of the project, which is funded by the EU Framework Programme 7, is to further our understanding of the operation of a range of European security measures beyond the state of the art. In this respect, University of Durham is organising a series of semi-structured interviews with key stakeholders working within EU institutions and agencies to discuss the operation of EU counter-terrorism and, particularly, of EU Databases and Systems of Information Exchange in the context of counter-terrorism / EU measures aimed at disrupting the financing of terrorism / the European Arrest Warrant in the context of counter-terrorism. The objective of this is to develop an empirically-informed understanding of the perceived impact, legitimacy and effectiveness of EU counterterrorism measures.

The interview will be conducted by a researcher from University of Durham and can be organised at **a time and location of your choosing and at your convenience**. It would be preferable if the interview could be conducted before January 2014.

If you decide to proceed you will be asked to sign an Informed Consent form, undertaking to maintain the confidentiality of the discussions. The outcomes of the interviews will include a report and scientific publication. We would also like to assure you that you may withdraw participation, without giving a reason, at any time before, during or after the interview. In such a case, every effort will be made to undertake a withdrawal of the relevant data, where this is possible.

Your participation in the research would make a valuable contribution to progressing our understanding of this topic beyond the state of the art.

In order to confirm your participation, please contact Dr Josephine Doody *before November 22nd 2013*. In the alternative, if you are unable to participate, we would also appreciate if you could refer us to a suitable alternative participant.

Yours sincerely,

Dr Josephine Doody
Research Fellow, University of Durham
Email: Josephine.doody@durham.a.uk

Appendix 2 Information Sheet For Participants

Securing Europe through Counter-terrorism: Impact, Legitimacy & Effectiveness (SECILE)

We would like to invite you to participate in this original research project. You should only participate if you want to; choosing not to take part will not disadvantage you in any way. Before you decide whether you want to take part, it is important for you to understand why the research is being done and what your participation will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information.

Aims of the research

The project seeks to examine the views of key stakeholders working within EU institutions and agencies, the security sector, and in civil society on the operation of European counter-terrorism action with respect to:

1. the use of technology in EU border control operations;
2. the European system for the disruption of the financing of terrorism;
3. the use of the European Arrest Warrant in cases of counter-terrorism.

Funding

This project is part-funded by the European Union Framework Programme 7.

What Will Happen if You Decide to Participate?

If you decide to participate, we will invite you to interview at a time and location at your convenience. The interview will last approximately 1 hour. The discussion will be recorded by electronic means and transcribed. If you decide to participate, you will be given this Information Sheet to keep and be asked to sign a Consent Form that will also permit the reuse and retention of data so that we can use the information you provide in our research.

Possible Benefits

You will receive a copy of the reports in hard copy and electronic formats.

Will the Information You Give Be Confidential?

No. It is not anticipated that the information you provide will be confidential. If however you would prefer that your participation is confidential, then we can provide you with a pseudonym and anonymity within the project reports.

What If You Change Your Mind About Participation?

It is up to you to decide whether to take part or not. You may withdraw participation, without giving a reason, at any time before the interview begins. You may also decide to withdraw at any time during the interview or after the discussion has ended. A decision to withdraw at any time, or a decision not to take part, will not affect the standard of care you receive.

Data Protection

We will store all personal data that is identifiable or could potentially be linked back to you securely. We will only share this data with our partners within the SECILE research consortium. We will not divulge your personal data to any third parties. We will securely store

this data for five years from the date of the conclusion of the project (30 October 2014). We will then securely destroy this data.

Publication

Reports covering the proceedings and outcomes of this research project will be published on the SECILE project website (www.secile.eu). These reports will be presented to consortium workshops with stakeholders and policy-makers in Durham and Brussels in 2014. The data generated may also be reflected in scientific publications arising from the research.

If you have any questions or require more information about this study, please contact the researcher using the following contact details:

Dr. Josephine Doody,
Research Fellow
Durham Law School
Palatine Centre
Stockton Road
Durham DH1 3LE
Email: Josephine.doody@durham.ac.uk

Appendix 3 Consent Form For Participants In Research Studies

Consent Form for Participants in Research Studies

Please complete this form after you have read the Information Sheet and/or listened to an explanation about the research.



Title of Study: Securing Europe through Counter-terrorism: Impact, Legitimacy & Effectiveness (SECILE)

Thank you for considering taking part in this research. The person organising the research will explain the project to you before you agree to take part. If you have any questions arising from the Information Sheet or explanation already given to you, please ask the researcher before you decide whether to join in. You will be given a copy of this Consent Form to keep and refer to at any time. Please tick or initial the following statements.

• I understand that if I decide at any time during the research that I no longer wish to participate in this project, I can notify the researchers involved and withdraw from it immediately without giving any reason.

• I consent to the processing of my personal information for the purposes explained to me. I understand that such information will be handled in accordance with the terms of the UK Data Protection Act 1998.

* I consent to the use of data generated from my participation for the production and publication of scientific outputs including reports, academic articles and book chapters, in line with the commitments on confidentiality and anonymisation that have been made to me.

Participant's Statement:

I _____
agree that the research project named above has been explained to me to my satisfaction and I agree to take part in the study. I have read both the notes written

above and the Information Sheet about the project, and understand what the research study involves.

Signed

Date

Appendix 4 Discussion Guide SSIs January 2014

<p>Introduction [about 5 min]</p> <p><i>Thank you</i> <i>Introduction of interviewer</i> <i>Purpose</i> <i>Confidentiality</i> <i>Duration</i> <i>Brief introduction of participant</i></p>	<p>Thank you for agreeing to participate in this interview. We appreciate that you took this time out of your busy schedule to participate in this project and your involvement is highly valued.</p> <p>My name is XXX and I am xxx</p> <p>Our interview will take approximately an hour and since we will be tape recording the discussion, I would kindly ask you to speak in a clear voice; your opinions and thoughts are very important for this research, and we do not want to miss any of your comments.</p> <p>As previously mentioned when you were originally contacted to participate in this discussion, this interview is on the topic of the Impact, Legitimacy and Effectiveness of European Counter Terrorism measures and it is being conducted as part of the SECILE Project, which is co-funded by the European Commission. If you wish to know more about the SECILE Project, kindly let me know and we can discuss at the conclusion of the interview.</p> <p>It is not anticipated that the information you provide will be confidential. If however you would prefer that your participation is confidential, then we can provide you with a pseudonym.</p> <p>Do you have any questions before we start?</p> <p>Ok so let me start off by asking you to briefly introduce yourself.</p> <p><i>Running Total: 5 min</i></p>
<p>Objectives</p>	<p>Clarifying Concepts and applying concepts to specific CT measures</p>
<p>Discussion on Impact [20 min]</p> <ul style="list-style-type: none"> - <i>To explore perceptions of Impact in general</i> - <i>To explore perception of key</i> 	<p><u>Item 1 Impact</u></p> <p>Thank you for your input. Let's talk about why we are here. In this research we are interested in two main things. First we are interested in how to <i>define</i> the concept of 'impact', 'legitimacy' and 'effectiveness' in the context of counter terrorism measures. And second, we want to know how these concepts apply to three specific CT measures, namely the European Arrest Warrant, CTF and the exchange of information for border surveillance.</p>

indicators for impact in relation to the three case-studies

The following section may not be necessary for every interviewee. Use as appropriate.

Because you may not be familiar with each of the counter terrorism measures we'll be discussing today, I'll just provide you with a brief explanation so you understand what we are referring to.

The European Arrest Warrant is an arrest warrant valid through all the member states of the European Union. Once it is issued in one state, it requires another state to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period.

Measures that aim to disrupt the financing of terrorism include measures like SWIFT which means processing and data mining financial data. It also encompasses the cooperation between national Financial Intelligence Units with the aim to identify terrorist networks and freeze their assets.

When discussing border surveillance, you could think of measures like the information sharing system and European police cooperation within FRONTEX.

First, ask the general questions pertaining to all the concepts. Then move to the more concrete application of the term in addressing the different CT measures.

Imagine you are asked to write a report on the 'Impact' of counter terrorism measures. What would you include in that report? In other words, which *elements* would be relevant for your *assessment* of the 'impact' of CT measures?

1. How would you 'measure' impact?

For example, how would you measure the impact of the measure on the different actors involved (the target subjects, the population as a whole, or those who implement the measure), or would you measure the impact on societal norms, or on (democratic) systems. Also, would you use empirical methods? What would 'count'? Whose views would be important to take into account?

2. In assessing the impact, how (if at all) would you deal with (un)intended positive and negative impacts of a measure?

Is there a balance? What kind of impacts are more important for the assessment, the intended positive impacts or the unintended negative?

3. Now thinking of impact, how would you assess the impact of:

A) The European Arrest Warrant

- Who has this measure had an impact on?
- Has it had a negative impact in any way?
- Has it had a positive impact?
- How can we measure the impact of the European Arrest Warrant?

B) Measures aimed at the disruption of Terrorist Financing

- Who has this measure had an impact on?
- Has it had a negative impact in any way?
 - Has it had a positive impact?
 - How can we measure the impact of measures aimed at the disruption of Terrorist Financing?

C) Border Surveillance (EU databases and systems of information exchange)

- Who has this measure had an impact on?
- Has it had a negative impact in any way?
 - Has it had a positive impact?
 - How can we measure the impact of Border Surveillance?

Running Total: 25min

Discussion on Legitimacy [20 mins]

- *To explore perceptions of Legitimacy in general*
- *If Q2 does not generate any discussion, then the scenario in 2.a. may be used to get the discussion started.*

Item 2 Legitimacy

Imagine you are asked by the EU to write a report on the 'Legitimacy' of a specific counter terrorism measure. What would you include in that report? In other words, which elements would be relevant for your assessment of the 'legitimacy' of a specific CT measure?

- 1. How would you assess the 'legitimacy' of a CT measure?**
- 2. What makes a CT measure legitimate?**

In this discussion it can be expected that some people will mention that the outcome of the measure may influence the legitimacy (output-legitimacy). If this happens, then Q2.a may be asked to get more clarification.

- To explore perception of key indicators for Legitimacy in relation to the three case-studies

2.a) In your assessment of the legitimacy, how does the end result matter?

- For example, imagine the ticking-time bomb scenario. How, if at all, would your judgement of the legitimacy of the CT change if the CT measure would be able to stop an imminent terrorist attack from happening?
- Imagine the same scenario, only now you imagine that CT measure was instigated by a dictator in a totalitarian regime. Would this change your perception of the legitimacy of the measure?

In this discussion it can also be expected that some people will mention the decision-making process. If this happens, then Q2.b may be asked to get more clarification.

2.b) In so far as the legitimacy relates to the process, to what extent are the following elements of importance:

- How the decision to use this measure was made
- Who made the decision
- Why the measure was introduced

3. Thinking of Legitimacy, how would you assess the legitimacy of:

A) In your view, is it legitimate to use the European Arrest Warrant to counter terrorism in Europe?

- Why?
- What would be your main argument in favour or against?
- Why?
- Could you give an example that may help illustrate that point?

B) In your view, is it legitimate to use CFT to counter terrorism in Europe?

- Why?
- What would be your main argument in favour or against?
- Why?
- Could you give an example that may help illustrate that point?

C) In your view, is it legitimate to share information in border surveillance to counter terrorism in Europe?

- Why?
- What would be your main argument in favour or against?
- Why?
- Could you give an example that may help illustrate that point?

Running total: 45 min

Discussion on effectiveness [20 mins]

- To explore perceptions of effectiveness in general

- To explore perception key indicators for effectiveness in relation to the three case-studies

Item 3 Effectiveness

Imagine you are asked by the EU to write a report on the 'Effectiveness' of a specific counter terrorism measure. What would you include in that report? In other words, which elements would be relevant for your assessment of the 'Effectiveness' of a specific CT measure?

1. How would you measure the Effectiveness of a measure?

a. What would you (take into account)?

In case there is silence, give examples:

- To what extent does it matter what the objective of a specific measure is?
- To what extent is the outcome of a measure of importance in determining the effectiveness?
- How would you take account of unintended consequences of a measure?
- How would describe the relation between the effectiveness of a measure and the legitimacy of a measure?

2. In your opinion, have the following CT measures been effective and could you explain why?

A) the European Arrest Warrant

To what extent do you think the measure has been effective in countering terrorism?

How do you perceive effectiveness in terms of this measure?

Under what circumstances would you deem this measure effective?

B) Measures aimed at disrupting the financing of terrorism

To what extent do you think the measure has been effective in countering terrorism?

How do you perceive effectiveness in terms of this measure?

Under what circumstances would you deem this measure effective?

C) Border surveillance (EU databases and systems of information exchange)

To what extent do you think the measure has been effective in countering terrorism?

How do you perceive effectiveness in terms of this measure?

Under what circumstances would you deem this measure effective?

Running Total: 65 Min

Objectives	Closure
<p data-bbox="167 347 375 459">Conclusion of interview [5 mins]</p> <ul data-bbox="167 492 414 683" style="list-style-type: none"><li data-bbox="167 492 359 571">▪ <i>Thank the interviewee</i><li data-bbox="167 571 414 683">▪ <i>Give information on SECILE</i>	<p data-bbox="446 347 1388 459">With this last exercise our discussion has come to an end. May I take this opportunity to once again thank you for joining us and for sharing your opinions, experiences and thoughts.</p> <p data-bbox="446 492 630 526"><i>Total: 70 min</i></p>

Appendix 5 Coding table

P1	Senior policy maker, DG Home
P2	Policy advisor, DG Home
P3	Legal Officer, EDPS
P4	Michele Coninx, President, Eurojust
P5	Alexander Theus, Senior Specialist Counter-Terrorism, Europol
P6	Policy Advisor, Office of the Counter Terrorism Coordinator
P7	Sophie Int'Veld, MEP
P8	Peter Hustinx, EDPS
P9	Specialist in EU Border Control
P10	Official, Frontex