The Impact, Legitimacy And Effectiveness Of EU Counter-Terrorism: Findings and Proposals

SECILE Consortium led by Professor Fiona de Londras
Durham Law School

SECILE is a major, collaborative project part-funded by the FP7 programme which aims to explore the meaning of 'impact', 'legitimacy' and 'effectiveness' in the context of EU counter-terrorism. The purpose of the project is to make key recommendations for reform, and to undertake empirically-informed work on three fields of EU activity that were developed under the banner of 'counter-terrorism' (the European Arrest Warrant, databases used in border surveillance, and measures for the disruption of terrorist finance). SECILE combines research partners with academic, military, judicial, practical and industry expertise. Led by Professor Fiona de Londras in Durham University, the consortium consists of Durham University, the Centre for Irish and European Security, King's College London, the National Maritime College of Ireland, the Peace Research Institute Oslo, Statewatch, and the Supreme Court of Latvia. These findings and proposals are the result of a three-stage methodology comprising a stock-taking phase, an empirical phase and a synthesis phase.

KEY FINDINGS

DOES COUNTER-TERRORISM *JUST* COUNTER TERRORISM?

Since 2001, the EU has been very active in counter-terrorism, having **produced 239 counter-terrorism measures** between Autumn 2001 and Summer 2013.

Ex ante impact assessments in the field of counter-terrorism appear to **prioritise quantifiable predicted impacts** (such as economic impacts) over societal impacts (such as human rights implications).

Over the past ten years **the European Parliament has often been marginalised** in respect of the making and oversight of EU counter-terrorism.

EU counter-terrorist measures are **rarely subjected to formal *ex post facto* review**.

The lack of systematic, participatory, evaluative review of EU counter-terrorist measures **undermines their legitimacy**.

In some cases, measures that were introduced under the 'counter-terrorism' umbrella are **not perceived of as primarily 'counter-terrorist'** by those who use and apply them.

Proposals for Reform

1 Enhance the Assessment of Rights-Related Impact

The practice of EU institutions suggests that social and rights-related impacts are recognised in impact assessments. However, **these impacts tend to be under-analysed** and the process for assessing the proportionality of proposed measures is unclear.

While it is extremely difficult to assess right-related impacts ex ante, **more attention should be paid to the views and estimations of specialist actors**. The European Data Protection Supervisor (EUDPS) and the European Union Agency for Fundamental Rights (FRA) are examples of specialist actors with responsibilities for rights assessments.

Ex post facto assessments should take into account a number of different perspectives (including those of affected communities). The speculative ex ante assessment should be **revisited, enriched and complicated** by these perspectives.

Participation

Participation is widely recognised as a key legitimacy-indicator. The particular nature of counter-terrorist decision-making means that maximum participation may not be appropriate. However, a greater degree of meaningful consultation with key stakeholders is likely to **increase the perceived legitimacy of EU counter-terrorism**.

In preparing ex ante assessments and considering proposals, the European Commission does involve a range of stakeholders.

It is essential that, in designing any ex post facto review, we consider whether additional stakeholders ought to be engaged with.

2 Enhance Democratic Oversight

A number of concerns about democratic oversight of EU counter-terrorism arose in the research. The European Parliament should be **empowered to engage in more effective and closer oversight** in this field. This is especially important given the large proportion of EU counter-terrorism that takes the form of non-legally-binding measures.

Greater and more meaningful participation would be welcomed in line with the EU's general commitment to openness in decision-making.

Between Autumn 2001 and Summer 2013 the EU produced **239 counter-terrorism measures**

88 of which are 'legally binding'

Establishing a **security cleared committee** may further enhance the oversight capacity of the European Parliament. Such a committee could engage with national and European authorities in respect of security-sensitive and classified information, and would work in accordance with international standards for intelligence and security oversight.

'Deficiencies in taking rights into account in making EU counter-terrorism persist in its implementation'

Prof Fiona de Londras

3 Enhance Transparency

Transparency is central to enhancing the legitimacy of EU counter-terrorism.
Transparency about the processes of policy-making, political decision-making, the extent and cost of EU counter-terrorism, its practical operation and its implications for individual and societal rights and values is crucial.

Transparency cannot be pursued to the extent that security-sensitive information becomes publically available and collective security is jeopardised. Thus, approaches to transparency ought to be both **innovative and appropriate.**

A **layered approach to transparency** might be devised to enhance legitimacy

- General policy-making should be participatory and as open as is possible

- Decisions about the degree of publicity of a particular process should be made by reference to objective criteria relating to security risk

- Where closed processes are used, alternative mechanisms for ensuring participation and transparency should be embraced (such as briefing a security-cleared committee of the European Parliament)

- Highly technical and technocratic stages of a policy's development should be preceded by a general policy-making process that embraces the principle of transparency
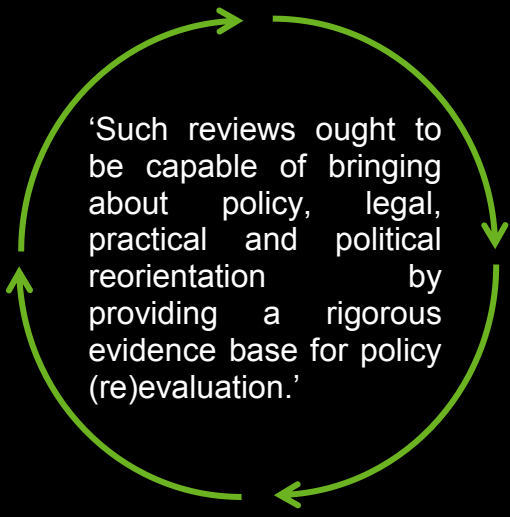
4 'Close the Loop' by Systematising Review

Key to understanding the impact, enhancing the legitimacy, and assessing the effectiveness of EU counter-terrorism is a **systematic and evaluative review of its development, operation and impact.**

It is **vital** that the EU would 'close the loop' from ex ante impact assessment to ex post facto evaluation. This can be achieved by:

- Complying with review clauses already contained in many counter-terrorism measures

- Establishing an independent reviewer of EU counter-terrorism

- Ensuring review by committees of the European Parliament (with appropriate security-clearance if necessary and appropriate).

- Enhancing the engagement of national oversight authorities with EU-level reviews

Any review of EU counter-terrorism ought to **critically assess both the impact and effectiveness** of these measures in order to enhance the legitimacy of their continuing operation.

'Such reviews ought to be capable of bringing about policy, legal, practical and political reorientation by providing a rigorous evidence base for policy (re)evaluation.'

> '**Ex post facto review does not take place in a consistent, systematic and regular manner, so EU counter-terrorism operates without a clear understanding of its impact on EU citizens**'
>
> *Prof Fiona de Londras*

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

Understanding 'Impact'

Impact can only be understood in relation to a referent: **who or what does the measure have an impact on?**

To comprehensively analyse impact, **a range of referents is required**. These include (i) societal groups, (ii) operational actors in the counter-terrorist field, (iii) national and transnational economies, (iv) politics, including international diplomacy, (v) law and legal systems, (vi) overall security, and (vii) the security concern that the measure is designed to address.

In respect of each of these referents consideration should be given to direct, indirect, national, transnational, positive and negative impacts.

Understanding 'Legitimacy'

Legitimacy can be understood across a number of different dimensions relating to **process, content and practice.**

In respect of making counter-terrorism law and policy, participation (including consultation) and accountability were identified as key elements of legitimacy.

It was found that legitimacy may be **temporally contingent**, reflecting the fact that a measure might be considered to be necessary and proportionate at one time but, as circumstances change, the appropriateness of the measure is called into question.

Understanding 'Effectiveness'

At its most basic, effectiveness can be understood as the extent to which the objectives of the measures in question have been achieved.

The perceived effectiveness of a measure is likely to bear some relationship to the **perspective and priorities** of the person or entity making the assessment. A **purely statistical evaluation** cannot provide exhaustive indicators of effectiveness; nor is it necessarily objective.

Furthermore, while a measure might be effective in one sense, it might be ineffective in others.

Fiona de Londras is a Professor of Law at Durham Law School. She is PI of the SECILE project, co-editor of *Critical Debates on Counter-Terrorist Judicial Review* (CUP, 2014) and author of *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011).

fiona.de-londras@durham.ac.uk

Josephine Doody is a Research Fellow at Durham Law School. Her research interests lie at the intersection between criminology, sociology and human rights.

josephine.doody@durham.ac.uk

Selected References

de Londras, F., Doody, J. and Howe, C., *The Impact, Legitimacy And Effectiveness Of EU Counter-Terrorism* (SECILE Consortium, 2014).

de Londras, F., *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011).

de Londras, F. and Doody, J., *Policy-Maker Perspective on Impact, Legitimacy and Effectiveness in EU Counter-Terrorism* (SECILE Consortium, 2013).

de Londras, F., Doody, J. and Downing, E., *Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013).

de Londras, F. and Doody, J., (eds), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (Routledge, forthcoming 2015).

de Londras, F., Doody, J., Zalkalne, S. and Supe, J., *Cross-Disciplinary Perspectives on Impact, Legitimacy and Effectiveness in the Context of EU Counter-Terrorism* (SECILE Consortium, 2013).

Martin-Mazé, M., *Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013).

Hayes, B., and Jones, C., *Catalogue of EU Counter-Terrorism Measures* (SECILE Consortium, 2013).

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

Further information and reports can be found at www.secile.eu

Please cite this document as:

de Londras, Fiona and Doody, Josephine (2014), 'The Impact, Legitimacy And Effectiveness Of EU Counter-Terrorism', Durham Law School Briefing Document, Durham University.