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# **The EU Counter-Terrorism Policy Responses to the Attacks in Paris: Towards an EU Security and Liberty Agenda**

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## **Abstract**

This paper examines the EU counterterrorism policy responses to the attacks in Paris, 7-9 January 2015. It provides an overview of the main EU-level initiatives that have been put forward in the weeks following the events and that will be discussed in the informal European Council meeting of 12 February 2015. The paper argues that a majority of these proposals predated the Paris shootings and had until that point proved contentious as regards their efficacy, legitimacy and lawfulness. A case in point is the EU Passenger Name Record (PNR) proposal. The paper finds that EU counterterrorism policy responses to the Paris events raise two fundamental challenges:

- A first challenge is to the freedom of movement, Schengen and Union citizenship. The priority given to the expansion in the use of large-scale surveillance and systematic monitoring of all travellers including EU citizens stands in contravention of Schengen and the free movement principle.
- A second challenge concerns EU democratic rule of law. Current pressures calling for an urgent adoption of measures like the EU PNR challenge the scrutiny roles held by the European Parliament and the Court of Justice of the European Union on counterterrorism measures in a post-Lisbon Treaty setting.

The paper proposes that the EU adopts a new European Agenda on Security and Liberty based on an EU security (criminal justice-led) cooperation model firmly anchored in current EU legal principles and rule of law standards. This model would call for 'less is more' concerning the use, processing and retention of data by police and intelligence communities, and it would instead pursue better and more accurate use of data that would meet the quality standards of evidence in criminal judicial proceedings.

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# The EU Counter-Terrorism Policy Responses to the Attacks in Paris

## Towards an EU Security and Liberty Agenda

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### Introduction

The killings of 7-9 January 2015 in Paris have spurred overwhelming responses of solidarity with the journal *Charlie Hebdo*<sup>1</sup> and widespread reactions condemning the events.<sup>2</sup> The deaths of 17 people led to a wide number of demonstrations by millions of people across France and Europe to honour the victims. During the following weeks questions were raised about the motives of the perpetrators, their degree of association with jihadist groups in Europe and the Middle East,<sup>3</sup> and their relationship with previous attacks. Debates have followed about freedom of expression, Islamophobia, but also radicalisation and counterterrorism policies for national<sup>4</sup> and European authorities to deploy in order to best respond to these and future terrorist attacks.

This paper examines the European Union's policy responses to the Paris shootings. A number of statements and policy agendas have proliferated since the events, starting with a Joint Statement signed in Paris on 11 January by Ministers of Interior and Justice of the member states. This was followed by an input from the EU Counter-Terrorism Coordinator (CTC) in preparation for the informal meeting of Justice and Home Affairs Ministers in Riga on 29 January, where member states' ministries formally adopted the so-called 'Riga Joint Statement', which outlines a set of counterterrorism policy priorities. The European Commission has also presented its ideas aimed at addressing the challenges posed by the Paris killings. These will be issues at the heart of the discussions in the forthcoming European Council meeting of 12 February.<sup>5</sup>

This paper argues that **a majority of the proposals outlined in these responses predated the Paris shootings and some had until that point proved contentious as regards their efficacy, legitimacy and lawfulness.** Building on the political momentum generated by the context of unanimity and solidarity in response to the Paris killings, proposals that until now had found narrow support are now presented as urgent and 'must-take' steps to prevent 'another Paris'.

A key example is the push currently given to accelerate the adoption of the European Passenger Name Record (PNR). EU PNR would establish a new database tracking the movement of and allowing for the blanket collection of data on all EU citizens and residents travelling by air within the Union, in addition to the bulk

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<sup>1</sup> <http://charliehebdo.fr>.

<sup>2</sup> For a detailed account of the Paris events, refer to <http://mondediplo.com/2015/02/04radicalisation>.

<sup>3</sup> [www.theguardian.com/world/2015/jan/11/paris-attacks-worldwide-inquiry-jihadi-networks-charlie-hebdo](http://www.theguardian.com/world/2015/jan/11/paris-attacks-worldwide-inquiry-jihadi-networks-charlie-hebdo).

<sup>4</sup> Refer to [www.theguardian.com/world/2015/jan/21/france-anti-terror-measures-paris-attacks-manuel-valls](http://www.theguardian.com/world/2015/jan/21/france-anti-terror-measures-paris-attacks-manuel-valls).

<sup>5</sup> "EU Leaders to Discuss Terrorism at February Summit", *European Voice*, 9 January 2015.

collection of data on international travellers. Other ideas include revisiting Schengen to permit a broader consultation or systematic checks of EU nationals' movements by police and intelligence services through the Schengen Information System (SIS II),<sup>6</sup> another EU database regarding persons to be refused entry or subject to specific checks at borders.

Accordingly, this paper finds that EU counterterrorism policy responses to the Paris events present us with **two fundamental policy challenges**:

**First, a challenge to freedom of movement, Schengen and European citizenship.** A fundamental contradiction arises when putting together all the initiatives outlined in these EU responses. The primary focus given to expanding the use of large-scale surveillance and monitoring of EU citizens' freedom of circulation (travel) and information by law enforcement authorities stands in contravention of Schengen rules and the principle of free movement inside the Schengen area, including for EU citizens. EU freedom of movement rules prohibit systematic checks and surveillance of EU citizens on the move, which is precisely what instruments such as the EU PNR or the newly proposed amendments of SIS II are seeking to establish.

**Second, a challenge to EU democratic rule of law.** Current calls for an urgent adoption of contentious measures like the EU PNR system constitute an additional challenge to the role of and position held by the European Parliament Civil Liberties, Justice and Home Affairs (LIBE) Committee and the Court of Justice of the European Union (CJEU) on these and related EU security measures. On the basis of the 2009 Lisbon Treaty, the European Parliament and the CJEU gained legal competence to ensure democratic accountability and judicial scrutiny of EU counterterrorism policies. They have both expressed concerns about the necessity, proportionality and fundamental rights compliance of large-scale (blanket) surveillance and data retention instruments, which is inherent to the EU counterterrorism responses to the Paris events.

In light of these two challenges, the EU counterterrorism proposals discussed so far are aimed at steering the adoption of previously existing instruments and amending existing ones in ways whose lawfulness and necessity to address phenomena such as those witnessed in France remain unsettled.

**What should the EU do? A new European Agenda on Security and Liberty** could instead be adopted by paying due regard to the lessons learned from previous EU policy experiences on counterterrorism, where rapid and emergence-led policy responses have in the past taken precedence over quality and democratically (rule of law) accountable decision-making. European institutions and actors should exercise caution and be wary of adopting without due care and democratic debate controversial EU antiterrorism instruments and tools whose impact may weaken the very founding principles that the Union conveys and stands for.

Reflection should be given to *the kind* of EU responses and contribution to addressing the Paris events that would **ensure a European added value and therefore justify 'more Europe' in these domains**. Priority could be given to a *more effective and accountable* practical use of existing tools and the development of an alternative **EU security (criminal justice-led) cooperation model**.

This model would be firmly anchored in existing EU legal and rule of law standards. As a first step the model should be based on an **in-depth evaluation of the gaps in and deficits** of current EU counterterrorism legislation, information systems and actors/agencies, as well as **the rule of law and implementation challenges** affecting their practical application. On the basis of this stock-taking and gap analysis, such a model should prioritise more effective use of current EU mechanisms and not necessarily seek to adopt new ones without proper discussion and independent assessment.

This new European agenda should aim at pursuing a response where **less is more in what concerns the use and exchange of data by police and intelligence communities**. A guiding principle should be to have **less data retention and processing, and better and more accurate use of data that meets the quality standards of evidence in criminal judicial proceedings**. As the Paris events have demonstrated, the main issue was not 'finding the needle in the haystack' or lacking data surveillance, as all the perpetrators of the attacks were already known and monitored by French intelligence services.

<sup>6</sup> For more information on the SIS II, see [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm).

There is instead a crucial need for rule of law-compliant law enforcement activities, rather than more technological solutions involving the collection of massive amounts of personal data and metadata. A new European Security and Liberty Agenda should foster a way forward in security cooperation in the EU that is compliant with democratic rule of law on fundamental rights, where **any transnational cooperation on national security goes hand-in-hand with independent judicial accountability of intelligence communities and law enforcement practices, and proper democratic scrutiny.**

This paper begins by providing an overview of the various EU policy responses that have been advanced so far following the Paris events by European institutions and actors and EU member state representatives (Section 1). It then discusses the controversies that these kinds of proposals had encountered *before* the killings in France, in particular the lack of support by the European Parliament and the Court of Justice of the European Union (Section 2). Section 3 then explains the two main challenges that the EU responses pose to EU free movement principles and Schengen, as well as to democratic rule of law over EU decision-making in police and criminal justice cooperation. The paper concludes by putting forward a number of recommendations to EU policy-makers and security professionals.

## 1. EU policy responses

The weeks following the Paris events have witnessed the emergence of successive official responses in national and European arenas on counterterrorism policies. **What have been the main ideas and counterterrorism proposals advanced by EU member states and European institutions and actors?**

This section provides a brief overview of the scope and the specific initiatives contained in the responses adopted by the Ministries of Interior and Justice of the EU member states (section 1.1), the EU Counter-Terrorism Coordinator (section 1.2) as well as the output of the informal Justice and Home Affairs (JHA) meeting in Riga (Latvia) on 29 January (the ‘Riga Joint Statement’) and those presented by the European Commission (sections 1.3 and 1.4).

### 1.1 The Joint Statement of 11 January

Right after the Paris events, a Joint Statement was published in Paris on 11 January by the Ministries of Interior and Justice of Latvia, Germany,<sup>7</sup> Austria, Belgium, Denmark, Spain, Italy, the Netherlands, Poland, the United Kingdom<sup>8</sup> and Sweden.<sup>9</sup> It was adopted in the presence of European Commissioner for Migration and Home Affairs Dimitris Avramopoulos, United States Attorney General Eric H. Holder, Jr., United States Deputy Secretary of Homeland Security Alejandro Mayorkas, Minister of Public Safety of Canada Steven Blaney, and European Counter-Terrorism Coordinator (CTC) Gilles de Kerchove.

The Joint Statement reaffirmed a commitment to fight terrorism<sup>10</sup> and called for strengthening cooperation amongst the participating member states’ services and those of relevant partners (US and Canada), as well as enhancing cooperation of law enforcement in order to “prevent and detect radicalisation in an early stage”. The following policy measures were underlined:

1. to adopt a European Passenger Name Record (PNR) framework, including intra-EU PNR;<sup>11</sup>

<sup>7</sup> [www.spiegel.de/international/germany/germany-plans-no-new-terror-laws-in-wake-of-charlie-hebdo-attack-a-1012188.html](http://www.spiegel.de/international/germany/germany-plans-no-new-terror-laws-in-wake-of-charlie-hebdo-attack-a-1012188.html).

<sup>8</sup> [www.theguardian.com/politics/2015/jan/11/david-cameron-snoopers-charter-tory-election-win](http://www.theguardian.com/politics/2015/jan/11/david-cameron-snoopers-charter-tory-election-win).

<sup>9</sup> [www.statewatch.org/news/2015/jan/france-joint-statement-of-ministers-for-interior.pdf](http://www.statewatch.org/news/2015/jan/france-joint-statement-of-ministers-for-interior.pdf).

<sup>10</sup> The Joint Statement recalls that “We are determined to implement all measures that may be helpful with respect to *the sharing of intelligence information* on the different forms of the threat, notably foreign terrorist fighters, on knowledge of their movements, and the support they receive, wherever they are, with a view to improving the effectiveness of our fight against these phenomena. To that end, we want to underscore our determination to use fully the resources of Europol and Eurojust as well as Interpol” (emphasis added).

<sup>11</sup> Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final, Brussels, 2.2.2011. According to the Proposal

2. to amend the rules laid down in the Schengen Borders Code to allow for broader consultation of the Schengen Information System (SIS II) during the crossing of external borders by individuals enjoying the right to free movement;
3. to reduce the supply of illegal firearms throughout Europe as a priority in the European Multidisciplinary Platform Against Criminal Threats (EMPACT);<sup>12</sup>
4. to establish “the detection and screening of travel movements by European nationals crossing the European Union’s external borders”, the focus being on more extensive detection and monitoring of certain passengers;
5. to develop the partnership of the major Internet providers allowing for a swift reporting of material that aims to incite hatred and terror and the condition of its removing; and
6. to support the activities of the Radicalisation Awareness Network (RAN).<sup>13</sup>

In addition to these actions, certain member state signatories of the Joint Statement are also looking to implement restrictive measures to confiscate the travel and identification documents of their own nationals who are ‘suspected jihadists’, which reportedly has the support of the European Commission.<sup>14</sup>

## 1.2 The EU Counter-Terrorism Coordinator

A second policy response has been the input by the European Counter-Terrorism Coordinator (CTC) in light of the informal meeting of Justice and Home Affairs Ministers in Riga (Latvia) on 29 January.<sup>15</sup> The CTC document lays down rather similar ideas to those previously outlined in the 11 January Joint Statement. The CTC advanced the following priority thematic areas and initiatives:

### 1. *Prevention of radicalisation*

- To develop counter narratives and informal joint policies on social media: engage with Internet companies, explore the role of Europol in referring terrorism and extremist content to social media platforms, and facilitate a European Commission proposal for a common approach on the legal and technical possibilities of removing illegal content and ways to speed up cross-border exchange of information about owners of IP addresses.
- To foster strategic communications and counter-narrative policies: propose RAN explore training civil society organisations and, drawing on the experience of the EU’s Fundamental Rights Agency (FRA), develop and implement a communication and outreach strategy with regard to fundamental rights and values.
- To address the underlying factors of radicalisation: recommend the European Commission develop a package of measures to assist member states to address the underlying factors of radicalisation and support initiatives related to education, vocational training, job opportunities and integration.

“PNR data is unverified information provided by passengers, and collected by and held in the carriers’ reservation and departure control systems for their own commercial purposes. It contains several different types of information, such as travel dates, travel itinerary, ticket information, contact details, the travel agent at which the flight was booked, means of payment used, seat number and baggage information.”

<sup>12</sup> [www.europol.europa.eu/content/eu-policy-cycle-empact](http://www.europol.europa.eu/content/eu-policy-cycle-empact).

<sup>13</sup> The Radicalisation Awareness Network (RAN) was launched by the European Commission in September 2011. The RAN brings together practitioners, experts and policy-makers from member states, sectors, organisations and academia to discuss and identify ‘good practices’ on radicalisation (see [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation\\_awareness\\_network/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/index_en.htm)).

<sup>14</sup> See <https://euobserver.com/justice/127252>.

<sup>15</sup> Council of the European Union, General Secretariat, Brussels, EU CTC input for the preparation of the informal meeting of Justice and Home Affairs Ministers in Riga on 29 January 2015, 17 January 2015.

- To develop de-radicalisation, disengagement and rehabilitation programmes, including in prison and as an alternative to prison in the judicial context: the Commission could facilitate the exchange of ‘best practices’ and support projects.

## **2. Border controls**

- Step up the detection and screening of travel movements by EU citizens crossing the Schengen external borders.<sup>16</sup>
- Amend the Schengen Borders Code to allow for broader consultation of SIS II “during the crossing of external borders by individuals enjoying the right to free movement [and] technical solutions should be developed so that there is no impact on passenger waiting times at passport controls”.
- Develop common criteria to enter ‘foreign fighters’ information into SIS II.

## **3. Information sharing**

- Move toward a European Passenger Name Record (PNR) framework, including an EU PNR.
- Increase the use of Europol and boost the information provided by national counterterrorism authorities to the ‘Europol Focal Point Travellers’; create a European Counter-Terrorism Centre at Europol focusing on intelligence sharing on foreign fighters and terrorist financing tracking, tackling firearms, capabilities to identify online terrorist activity and improved strategic intelligence.
- Develop a more proactive intelligence-led use in cases of terrorist-related convictions of the European Criminal Networks Information System (ECRIS),<sup>17</sup> a system whereby member states hold a central record of their own nationals’ criminal histories that could be shared with other member states.
- Present a new legislative proposal on data retention by the European Commission.
- Fully implement and use to its maximum extent the API Directive.<sup>18</sup>
- The Commission should explore rules “obliging internet and telecommunications companies operating in the EU to provide under certain conditions access of the relevant national authorities to communications (share encryption keys)”.
- Relaunch the discussion on the feasibility of a European Terrorist Financing Tracking System (TFTS).

## **4. Judicial response**

- Step up international judicial cooperation in terrorism cases, in particular in cases of foreign fighters.
- EU member states should make more optimal use of the possibilities for exchange of information on prosecutions and convictions with Eurojust,<sup>19</sup> and increase the exchange of information with Eurojust in cases of trafficking of firearms and cybercrime.

<sup>16</sup> Page 6 of the CTC input. See also the Council Conclusions on Terrorism and Border Security, which stated “that the examination of the proposals on the Smart Borders Package (Entry/Exist and Registered Travellers Programme) should be continued and that the legal and technical conditions for the access for law enforcement purposes to the Entry/Exist System by competent authorities of Member States should be examined by the Commission and the Member States so that this access is effective from the beginning”, page 5. Council of the EU, Draft Council Conclusions on Terrorism and Border Security, 9906/14, Brussels, 16 May 2014.

<sup>17</sup> Refer to [http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm).

<sup>18</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/114582\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114582_en.htm). For an evaluation of this Directive, see [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/irregular-immigration/docs/evaluation\\_of\\_the\\_api\\_directive\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/irregular-immigration/docs/evaluation_of_the_api_directive_en.pdf).

<sup>19</sup> Reference is here made to Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.

- Coordinate at EU level the legal challenges in the gathering and admissibility of ‘e-evidence’ in terrorism cases; member states should make maximal use of Eurojust tools, in particular its coordination meetings and coordination centres.
- Develop rehabilitation programmes in the judicial context.
- Present a legislative proposal to update the Framework Decision on Combating Terrorism to implement the UN Security Council Resolution 2178.

### 5. Firearms

- To increase EU member states’ participation in the Operational Action Plan on firearms adopted by the Standing Committee on Operational Cooperation on Internal Security (COSI), and to fully implement all existing measures dealing with “fighting illicit firearms trafficking”,<sup>20</sup> Europol could present a state of play on the use by member states of Europol’s firearms database, while the Commission could make proposals to improve information exchange mechanisms and the collection and destruction of prohibited weapons, and examine possibilities for harmonisation of rules for the demilitarisation of firearms and the trade of firearms via the Internet.

### 1.3 The Riga Joint Statement

The above responses provided by and large the basis for the discussions that were held at the last informal Justice and Home Affairs (JHA) meeting in Riga (Latvia) on 29 January. The informal meeting led to the adoption of the so-called ‘Riga Joint Statement’ by member states’ Ministries of Interior and Justice. The statement constitutes the input by JHA ministers to the discussion at the Informal Meeting of the Heads of State or Government on 12 February 2015.<sup>21</sup>

One of the conclusions presented in the Joint Statement was that further work should build upon existing EU tools by accelerating and amplifying their implementation, and propose new initiatives to increase their effectiveness. The ministers also called for “a European agenda on Security...to address the threats to internal security of the EU for the next years”, which will be part of the forthcoming review and update of the EU Internal Security Strategy by mid-2015.<sup>22</sup>

Similar to the previously mentioned responses, the ministers reaffirmed the need to:

- create “without further delay” an EU PNR framework;
- cooperate closely with the private sector and “encourage them” to remove “terrorist and extremism content from their platforms”, with Europol contributing to the detection of illegal content;
- enable further information exchange on mobility by Europol Focal Point Travellers;<sup>23</sup>

<sup>20</sup> Refer to Commission Communication, Firearms and the Internal Security of the European Union COM(2013) 716 final, Brussels, 21 October 2013.

<sup>21</sup> See Council of the European Union, Informal Meeting of the Heads of State or Government – Draft Statement of the Members of the European Council, Brussels, 5853/15, 2 February 2015.

<sup>22</sup> For more information on the Internal Security Strategy, see [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/internal-security/internal-security-strategy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/internal-security/internal-security-strategy/index_en.htm). For a critical analysis see E. Guild and S. Carrera (2011), “Towards an Internal (In)Security Strategy in the EU”, CEPS Liberty and Security Series, Brussels.

<sup>23</sup> The CTC Report also highlights how in 2013 Europol created a new Focal Point, TRAVELLERS, within the Analytical Work File, which is presented as a ‘pan-European analytical tool’ aimed at supporting the authorities of participating member states and third countries with whom an operational agreement has been concluded for the collection, analysis and sharing of information as regards “recruitment and travel facilitation of suspected individuals”. The Focal Point can produce “EU travel patterns” and operational reports seeking to support member states’ investigations. See Council of the EU, Report on the Implementation of the EU Counter-Terrorism Strategy, 28 November 2014, 15799/14, Brussels. See also the Discussion Paper <http://data.consilium.europa.eu/doc/document/ST-15715-2014-REV-2/en/pdf>.



- reinforce exchange of information and develop further cross-border cooperation on fighting illegal trafficking of firearms, by systematically inserting information into SIS II;
- fight against financing of terrorism;
- amend the Schengen Borders Code in order to “reinforce external borders by making it possible to proceed to systematic checks on individuals enjoying the right of free movement against databases relevant to the fight against terrorism based on the common risk indicators.”

#### 1.4 The European Commission

At the Riga informal JHA meeting, Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos highlighted the priorities for the European Commission in response to the Paris events, **some of which show a surprising resemblance to those already highlighted by EU member states and the CTC.**<sup>24</sup>

These include continuing support of member states in preventing and addressing radicalisation and other forms of extremism through RAN, developing “concrete workable solutions” that will strengthen the commitment of social media platforms to reducing illegal content online, and increasing the efficiency of SIS II. Commissioner Avramopoulos also pointed out the need to reinforce cooperation between Europol and other EU security agencies and bodies.

As regards “identification of travel routes of terrorists”, the Commissioner stressed the need to be “more proactive” in monitoring suspicious movement across borders and to gather information. He confirmed the urgent necessity of the EU PNR and the Commission’s current reformulation of a new legal instrument.<sup>25</sup> Details of the new draft EU PNR proposal saw the light on 28 January in *The Guardian*.<sup>26</sup> The European Commission proposes amendments to the previous proposal dating back to 2011.<sup>27</sup> It is not clear the extent to which this is an attempt to bring the proposal more in line with the strict criteria as defined by the Court of Justice of the European Union (CJEU) in the *Digital Rights Ireland* judgment,<sup>28</sup> where the Court invalidated the Data Retention Directive (see Section 2.1 below). Commissioner Avramopoulos also pointed out that the Commission has already adopted new measures to improve the effectiveness of SIS II for counterterrorism purposes, so that:

SIS will now be able to reinforce the efforts of Member states to invalidate personal identification documents of persons who may join terrorist groups outside the European Union. What we are doing now is developing common risk indicators and criteria for entering relevant alerts in the Schengen Information System (SIS).

This will be done through the adoption of a European Commission Implementing Decision that will replace the annex to a previous Commission Implementing Decision 2013/115/EU on the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II).<sup>29</sup> The new decision aims at providing instructions to relevant law enforcement authorities on accelerated reporting and invalidated documents used for travel purposes. The draft version states in point 6:

It is indispensable to lay down a new accelerated procedure for information exchange on alerts on discreet and specific checks in order to address a possible increased threat posed by some persons, involved in terrorism or in serious crime, which require immediate action of the competent

<sup>24</sup> Speech of Commissioner Avramopoulos: Discussions on fighting terrorism at the informal JHA council in Riga, Riga, 29 January 2015.

<sup>25</sup> [www.statewatch.org/news/2015/jan/com-pnr-plans.htm](http://www.statewatch.org/news/2015/jan/com-pnr-plans.htm) and [www.theguardian.com/uk-news/2015/jan/28/european-commission-blanket-collection-passenger-data](http://www.theguardian.com/uk-news/2015/jan/28/european-commission-blanket-collection-passenger-data).

<sup>26</sup> [www.theguardian.com/uk-news/2015/jan/28/european-commission-blanket-collection-passenger-data](http://www.theguardian.com/uk-news/2015/jan/28/european-commission-blanket-collection-passenger-data).

<sup>27</sup> EU PNR – the way forward, <http://statewatch.org/news/2015/jan/eu-com-new-pnr-note.pdf>.

<sup>28</sup> Case C-293/12 & C-594/12, *Digital Rights Ireland*, 8 April 2014, Court of Justice of the European Union.

<sup>29</sup> For the version currently in force, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0115&from=EN>.

authorities. It is necessary to indicate for end-users if a document used for travel purposes was invalidated by the issuing national authorities to ensure the seizure of such documents.<sup>30</sup>

As regards firearms, Commissioner Avramopoulos announced the need to review existing legislation on firearms and the Commission's intention to submit to the European Parliament and the Council a report on the situation and on whether new legislative or non-legislative proposals are needed.<sup>31</sup> At the same meeting, Commissioner for Justice, Consumers and Gender Equality Věra Jourová<sup>32</sup> underlined, among other initiatives, the need to accelerate the negotiation of the proposed 'data protection police' Directive (COM(2012)10) dealing with data protection in the fields of police and judicial cooperation in criminal matters.<sup>33</sup> This proposal is part of a wider data protection reform legislative package that the Commission launched in early 2012 and that is also composed of the general data protection Regulation (COM(2012)11).<sup>34</sup>

## 2. Securing consent? Responses to the Paris event and the erasing of controversies

The previous section has revealed a long list of initiatives presenting multifaceted aspects. Some are rather technical, which makes it difficult for any logical understanding of their actual reach, scope and value added. However, a central point where all these counterterrorism proposals seem to converge relates **to fostering exchange of intelligence-led information and use of large-scale databases allowing for systematic surveillance of EU citizen and resident movement in the Schengen territory.**

A majority of these proposals predated the Paris shootings. This is obvious when looking at the measures already discussed in meetings such as the 3,354th Justice and Home Affairs Council Meeting Conclusions of 4-5 December 2014.<sup>35</sup> This meeting debated the issue of foreign fighters on the basis of the EU Counter-Terrorism Coordinator Report on the Implementation of the EU Counter-Terrorism Strategy.<sup>36</sup>

The lack of novelty of the counterterrorism solutions that have been put forward is therefore evident. More important, however, some of these measures had until now proved highly controversial as regards their efficacy, legitimacy and lawfulness. This has been the situation in respect of the EU PNR and smart borders proposals (section 2.1), and the EU radicalisation strategy (section 2.2).

### 2.1 EU PNR and smart borders

A case in point is the EU Passenger Name Record (EU PNR). An EU PNR framework would allow for information being provided by every passenger, collected by air carriers and used for their ticketing, reservation and check-in systems. PNR needs to be distinguished from advanced passenger information (API),

<sup>30</sup> Available at [www.statewatch.org/news/2015/feb/eu-com-amend-sch-code-checks.pdf](http://www.statewatch.org/news/2015/feb/eu-com-amend-sch-code-checks.pdf).

<sup>31</sup> More specific ideas were outlined by DG Home Affairs on 27 January in a debate on "Counter-Terrorism, Radicalisation and Foreign Fighters", which took place at LIBE Committee in the European Parliament following the events in Paris on 7 January and in the run-up to the informal JHA Council on 29-30 January in Riga and the European Council on 12 February.

<sup>32</sup> Speech of Commissioner Jourová: Discussions on fighting terrorism at the informal JHA council in Riga, Riga, 29 January 2015.

<sup>33</sup> See European Commission, proposal for directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final, 25.1.2012, Brussels.

<sup>34</sup> European Commission, proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, 25 January 2012.

<sup>35</sup> Council of the EU, 16526/14, Press 630, Press Release 3,354th Justice and Home Affairs Council Meeting, 4-5 December Brussels. See also [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/145004.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/145004.pdf).

<sup>36</sup> Council of the EU, Report on the Implementation of the EU Counter-Terrorism Strategy, 28 November 2014, 15799/14, Brussels. See also the Discussion Paper <http://data.consilium.europa.eu/doc/document/ST-15715-2014-REV-2/en/pdf>.

which is currently under operation in the EU on the basis of Directive 2004/82.<sup>37</sup> Whereas API concerns data from the machine-readable zone of the passport (including name, date of birth, passport number and nationality), PNR contains information registered by the airline companies when a traveller makes a reservation. The data that may be taken from PNR depends on the information the traveller submits to the ticket reservation system.<sup>38</sup>

The Commission had first tabled a proposal to establish an EU PNR system back in November 2007.<sup>39</sup> In November 2008, the European Parliament refused to vote on the proposal due to concerns with data protection and privacy. Similar concerns were raised by the European Data Protection Supervisor (EDPS), the EU Agency for Fundamental Rights (FRA), the Article 29 Working Party and other organisations. The initiative nonetheless made it into the 2009 Stockholm Programme – the Third Multi-Annual Programme for the Area of Freedom, Security and Justice<sup>40</sup> – and the Commission presented a new version of the initiative in 2011.<sup>41</sup>

In April 2013, the LIBE Committee of the European Parliament rejected the 2011 Commission proposal to establish EU PNR.<sup>42</sup> Concerns included that the European Commission had presented only anecdotal evidence for the usefulness of EU PNR data in the fight against terrorism and serious transnational crime, as well as doubts regarding the necessity and proportionality of the blanket retention of all passenger data. The LIBE Committee called for reinforcing the principle of purpose limitation, exclusion of data mining and profiling, and proper access and redress rights. Moreover, both the LIBE Committee and the European Data Protection Supervisor (EDPS),<sup>43</sup> held that adoption of the EU PNR proposal should not precede the agreement on the general framework of EU data protection rules mentioned above.

A number of independent studies have provided further evidence of the lack of cost-effectiveness inherent to the EU PNR proposal for a directive. These have also proved that the Commission has so far not justified the added value of an EU PNR system for the prevention or prosecution of terrorist offences or serious crimes, nor demonstrated its compliance with the EU legally binding principles of proportionality and necessity.<sup>44</sup> As the Article 29 Working Party has recently stated:

The Article 29 Working Party reaffirms that *the extent and indiscriminate nature* of EU PNR data processing for the fight against terrorism and serious crime is likely to seriously undermine the right to the protection of private life and personal data of all travellers as set out in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union...such an interference with the fundamental rights would be permissible *only if its necessity was to be demonstrated and the principle of proportionality respected* (emphasis added).<sup>45</sup>

<sup>37</sup> Directive 2004/82/EC of 29 August 2004 on the obligation of carriers to communicate passenger data, OJ L 261/24, 6.8.2004.

<sup>38</sup> E. Brouwer (2011), “Ignoring Dissent and Legality: The EU’s Proposal to Share the Personal Information of all Passengers”, CEPS Paper in Liberty and Security in Europe, Brussels.

<sup>39</sup> European Commission, Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, COM(2007) 654, Brussels, 6 November 2007.

<sup>40</sup> S. Carrera and E. Guild (2012), “Does the Stockholm Programme Matter? The Struggles over Ownership of AFSJ Multiannual Programming”, CEPS Paper in Liberty and Security in Europe, Brussels.

<sup>41</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM(2011) 32, Brussels, 2 February 2011.

<sup>42</sup> Refer to [www.europarl.europa.eu/news/en/news-room/content/20130422IPR07523/html/Civil-Liberties-Committee-rejects-EU-Passenger-Name-Record-proposal](http://www.europarl.europa.eu/news/en/news-room/content/20130422IPR07523/html/Civil-Liberties-Committee-rejects-EU-Passenger-Name-Record-proposal).

<sup>43</sup> See also EDPS, Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, adopted on 25 March 2011, and also Article 29 Data Protection Working Party, Opinion 10/2011, adopted on 5 April 2011.

<sup>44</sup> Brouwer (2011).

<sup>45</sup> See [www.cnil.fr/english/news-and-events/news/article/press-release-wp-29-statement-on-the-eu-pnr-system](http://www.cnil.fr/english/news-and-events/news/article/press-release-wp-29-statement-on-the-eu-pnr-system).

Similar concerns have been raised as regards EU proposals on smart borders, which was first launched by the Commission in its 2008 Communication “Preparing the Next Steps in Border Management in the European Union”.<sup>46</sup> The proposals were subject to heated debates and concerns across EU institutions and academic, policy and civil society circles.<sup>47</sup> It took the Commission five years to take concrete legislative steps forward. The Commission presented the smart borders package in February 2013. The package is composed of an Entry-Exit System (EES) designed to register third-country nationals entering and leaving the EU territory,<sup>48</sup> and a Registered Traveller Programme (RTP) aimed at speeding up border-crossing for vetted or “bona fide” travellers based on automated identity checks and border-crossing gates. The financial and technical feasibility of the European Commission’s February 2013 legislative proposals for EU smart borders has proven a matter of controversy and disagreement.<sup>49</sup>

It is important to highlight that the primary focus of instruments such as the EU PNR or smart borders seems to be on detection and identification of travel, which has only limited links to the actual background of the Paris events. The ‘travel’ dimension of the attacks was minimal. It is understood that the attackers did not engage in undetected international travel. US and French intelligence services appear to have been aware that two of them had travelled to Yemen, purportedly to undergo training.<sup>50</sup> The third attacker, Amedy Coulibaly, is understood never to have travelled to training camps in the Middle East,<sup>51</sup> and was also known to and under surveillance of French intelligence and law enforcement.

One therefore wonders the extent to which these policy initiatives would have actually contributed to effectively preventing the Paris attacks. This comes along with the fact that the individuals who committed the attacks in Paris were already known to security authorities. It appears that several member states already possessed information indicating they could pose a threat.<sup>52</sup> Consequently, how ‘more information’ about people travelling would have actually helped remains unclear.<sup>53</sup>

## 2.2 Radicalisation

The above-mentioned JHA Council Conclusions of December 2014 adopted the Guidelines for the EU Strategy for Combating Radicalisation and Recruitment of Terrorism, which were intended to implement the revised EU Strategy adopted by the Council in June 2014, which in turn supplemented the first strategy issued in

<sup>46</sup> European Commission (2008), Preparing the Next Steps in border management in the European Union, COM(2008)69 final, 13 February 2008, Brussels.

<sup>47</sup> E. Guild, S. Carrera and F. Geyer (2008), “The Commission’s New Border Package: Does it take us one step closer to cyber-fortress Europe?”, CEPS Policy Brief, Brussels.

<sup>48</sup> European Commission, Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95 final, Brussels; and European Commission, Proposal for a Regulation establishing a Registered Traveller Programme, COM(2013) 97 final, Brussels.

<sup>49</sup> J. Jeandesboz, D. Bigo, B. Hayes and S. Simon (2013), “The Commission’s legislative proposals on smart borders: their feasibility and costs”, Brussels: European Parliament, PE 493.026.

<sup>50</sup> See [www.liberation.fr/monde/2015/01/15/attentats-a-paris-la-justice-espagnole-enquete-sur-un-sejour-de-coulibaly-en-espagne\\_1181351](http://www.liberation.fr/monde/2015/01/15/attentats-a-paris-la-justice-espagnole-enquete-sur-un-sejour-de-coulibaly-en-espagne_1181351).

<sup>51</sup> Ibid. (see also <http://mondediplo.com/2015/02/04/radicalisation>).

<sup>52</sup> “Chérif Kouachi, un djihadiste bien connu des services antiterroristes”, *Le Journal du Dimanche*, 8 January 2015 ([www.lejdd.fr/Societe/Faits-divers/Attentat-de-Charlie-Hebdo-Cherif-Kouachi-un-jihadiste-bien-connu-des-services-antiterroristes-711082](http://www.lejdd.fr/Societe/Faits-divers/Attentat-de-Charlie-Hebdo-Cherif-Kouachi-un-jihadiste-bien-connu-des-services-antiterroristes-711082)).

<sup>53</sup> In 2011, the EDPS adopted the opinion that the PNR proposal did not meet the necessity principle: the proposed Passenger Name Record (PNR) system does not “demonstrate the necessity and the proportionality of a system involving a large-scale collection of PNR data for the purpose of a systematic assessment of all passengers” (see <https://privacyassociation.org/news/a/2011-04-01-edps-pnr-proposal-does-not-meet-necessity-principle>).

2005.<sup>54</sup> As reported by the EU CTC,<sup>55</sup> there are a number of initiatives at member state and EU levels “on early detection of the radicalisation process which potential foreign fighters go through”. In addition, RAN has collected data on civil society initiatives and ‘good practices’ for engagement with foreign fighters or their environments.

The European Commission adopted a Communication on “Preventing radicalisation to terrorism and violent extremism: strengthening the EU’s response” on 15 January 2014, one of whose main goals is the establishment this year of a European knowledge hub on violent extremism, concentrating expertise in preventing and countering radicalisation to terrorism and violent extremism. A number of member states have developed specific projects in this regard, some of which also relates to the Internet.<sup>56</sup>

It is worth noting that the counter-radicalisation strategies outlined in these documents have been the target of high-level criticism and concern the process on which counter-radicalisation policies are premised, i.e. that of a progressive and predictable passage to violence has been broadly rejected by the scientific community, including by a report explicitly commissioned by DG Home Affairs in 2008.<sup>57</sup>

Similarly, the EU counter-radicalisation strategy of 2005 adopted under the UK’s presidency, and revised in 2014, is largely based on the UK’s early PREVENT strand of the CONTEST strategy.<sup>58</sup> This ‘softer approach’ (not based on counter-terrorism legislation) to preventing radicalisation has drawn criticism from across the political spectrum as being inefficient, inconclusive and possibly damaging to community relations.<sup>59</sup> It has recently been criticised by important figures such as MI5’s former head, Baroness Manningham Buller, who warned of the danger of the population turning to “vigilantism” due to the atmosphere of fear induced by terrorism.<sup>60</sup> This has been confirmed by a recent study that concluded, “[W]hile these programmes do not directly contribute to the escalation of violence per se, they have in several instances been found to generate a feeling of suspicion that is unhelpful to the relations between the state and Muslim communities in Europe”.<sup>61</sup>

<sup>54</sup> Council of the EU, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 19 May 2014, and Council of the EU, The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 24 November 2005.

<sup>55</sup> Council of the EU, Report on the Implementation of the EU Counter-Terrorism Strategy, 28 November 2014, 15799/14, Brussels. See also the Discussion Paper (<http://data.consilium.europa.eu/doc/document/ST-15715-2014-REV-2/en/pdf>).

<sup>56</sup> Ibid. According to the Report, “The Check the Web (CTW) portal, which was set up as a consequence of the work initiated by Germany in the context of its Internet work stream, is still being run by Europol. In 2014, the CTW team played a key role in a number of investigations as it served as an expert witness in court cases. Clean IT, a Dutch-led project that started in 2011 and ended in early 2013. The project’s objective was to tackle the use of the Internet for terrorist purposes through public-private partnerships. The final report was presented in January 2013.”

<sup>57</sup> European Commission’s Expert Group on Violent Radicalisation (2008), *Radicalisation Processes Leading to Acts of Terrorism*.

<sup>58</sup> PREVENT consisted initially of initiatives ranging from targeted local partnerships between community representatives and law enforcement to broader community cohesion programmes (Preventing Extremism Together) and mentoring schemes for potential radicals (CHANNEL). The PREVENT programme came under considerable criticism from both state institutions – in particular with a report of the House of Commons Select Committee Report on Preventing Violent Extremism (House of Commons 2010) – and non-governmental institutions, which included community representatives and civil liberties organisations (see [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97976/prevent-strategy-review.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf)).

<sup>59</sup> House of Commons, House of Lords Joint Committee on National Security Strategy (2012), *First Review of the National Security Strategy 2010*. London: Great Britain Parliament House of Commons.

<sup>60</sup> “Tony Blair’s anti-jihadist programme has failed, says ex-MI5 chief”, *The Telegraph*, 14 January 2015 ([www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11344281/MI5-chief-Blairs-anti-jihadist-programme-has-failed.html](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11344281/MI5-chief-Blairs-anti-jihadist-programme-has-failed.html)).

<sup>61</sup> D. Bigo, L. Bonelli, E. Guittet and F. Ragazzi (2014), “Preventing and Countering Youth Radicalisation in the EU”, European Parliament Study, Brussels. This study also includes a review of the scientific literature on this subject.

### 3. The challenges: Freedom of circulation and democratic rule of law at stake

EU counterterrorism policy responses to the Paris events and the emergency-led policy-making logic pose two fundamental challenges: first, to free movement, Schengen and Union citizenship (Section 3.1); second, to the democratic rule of law and fundamental rights (Section 3.2).

#### 3.1 Free movement, Schengen and EU citizenship

A common thread characterising the set of EU policy responses outlined in Section 1 is their focus on mobility surveillance via large-scale databases that facilitate the exchange of information on travelling EU citizens and residents among police and intelligence authorities. The target of initiatives such as EU PNR is all travellers, including EU citizens, crossing borders, including internal borders in the Schengen territory and when leaving the common Schengen territory. This discussion has even led to the question of whether Schengen is working effectively. A key challenge that emerges when looking at the entire package of ‘mobility-focused’ policy initiatives advanced by the EU responses outlined in Section 1 is that **a central contradiction arises with the Schengen and free movement principle.**

Large-scale surveillance and systematic monitoring by police and intelligence authorities of EU citizens’ movements on the basis of ‘risk categories’ is problematic on various fronts. It does not only undermine freedom of circulation. The proposed measures, if implemented, may be in violation of the right to non-discrimination, because the use of profiling will inevitably lead to the unfair targeting of European citizens with a second (‘foreign’) nationality or foreign background.

Databases **such as EU PNR or smart borders will represent a move towards a *person-centric approach in mobility control and surveillance***, where an individual may be or become a security risk on the basis of profiles not necessarily related to nationality or migration status, but rather to other behavioural, physical or physiological characteristics. This move towards profiling and data-mining stands in a difficult relationship with the principle of non-discrimination, which is at the basis of the EU legal system and the EU Charter of Fundamental Rights.<sup>62</sup>

The new amendments that the Commission is currently introducing in SIS II through an ‘implementing decision’ are equally of concern. Not only does the decision-making process prevent any democratic debate and input by the European Parliament. It also raises questions concerning the need and actual effectiveness of widening the scope of systematising the crossing of EU external borders by EU citizens. **To what extent will the development of common risk indicators and criteria for entering relevant alerts in SIS comply with the above-mentioned principles of non-discrimination and proportionality?**

In accordance with the proportionality clause, as included in Article 21 of both the SIS II Regulation 1987/2006<sup>63</sup> and the SIS II Decision 2007/533,<sup>64</sup> each member state must, before entering an alert into SIS II, determine “whether the case is adequate, relevant and important enough to warrant entry of the alert”. The ways in which this requirement will be met in the practical implementation of the new Commission amendment remains contested.

EU citizenship also seems to be increasingly at stake. Initiatives such as deprivation of nationality on the basis of suspicion that EU citizens may be involved in acts of political violence stand in a difficult relationship with international and European legal principles and standards applicable to EU member states in cases of involuntary loss of nationality and EU citizenship.<sup>65</sup> These individuals are wrongly labelled as ‘foreign fighters’, as they are in fact not foreigners but rather EU nationals and therefore qualify for Union citizenship.

<sup>62</sup> S. Carrera and N. Hernanz (2015), “Re-Imagining Mobility and Identity Controls: The Next Generation of the EU Migration Management Toolkit”, *Journal of Borderlands Studies*, forthcoming.

<sup>63</sup> Regulation 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), 20 December 2006.

<sup>64</sup> Decision 2007/533 on the establishment, operation and use of the second generation Schengen Information System (SIS II), 12 June 2007.

<sup>65</sup> S. Carrera and R. de Groot (2014), “European Citizenship at the Crossroads: Enhancing European Cooperation on Acquisition and Loss of Nationality”, CEPS Paper in Liberty and Security in Europe, Brussels.

Amongst the most relevant principles in this context are those of the protection of Union citizenship as well as procedural guarantees and international law principles protecting individuals against statelessness.

### 3.2 EU democratic rule of law

EU responses calling for an urgent adoption of instruments such as EU PNR could also be read as a challenge to the roles of and contributions by the European Parliament and the Court of Justice of the European Union. Both institutions, however, play a key function in ensuring the respect of democratic rule of law with fundamental rights principle and appropriate checks and balances in the adoption and implementation of legislative counterterrorism acts falling within the remit of the EU Area of Freedom, Security and Justice. Since December 2014 the Commission and the CJEU have full enforcement powers over EU member states of legislative measures adopted in the areas of police and criminal justice cooperation, including those related to counterterrorism.<sup>66</sup> The European Parliament became co-legislator in these domains at the end of 2009 with the entry into force of the Lisbon Treaty.<sup>67</sup> These Treaty-based innovations sought to address the democratic and judicial deficits, as well as the lack of transparency that used to characterise Justice and Home Affairs cooperation at EU level.

**Both the European Parliament and the CJEU have expressed deep concerns about the necessity and proportionality of large-scale (blanket) surveillance and data retention in the scope of EU counterterrorism policies.** EU counterterrorism responses can be read as resistance to the EU democratic rule of law introduced by the Lisbon Treaty to EU-decision making in questions related to security cooperation including counterterrorism policies.

**The LIBE Committee of the European Parliament has been particularly critical as regards large-scale surveillance<sup>68</sup> and specific tools such as the EU PNR Proposal for Directive,<sup>69</sup>** which as stated above was voted down in April 2013.<sup>70</sup> Main concerns included that the Commission had only presented anecdotal evidence as regards the added value of a proactive use of PNR data in the fight against terrorism and the lack of debate in respect of the necessity and proportionality of the blanket retention of all passenger data. Also, the LIBE Committee members were concerned that the Commission had not explored less intrusive alternatives to the EU PNR. A plenary majority decided to refer the proposal back to the LIBE Committee for further examination. The LIBE Committee of the new European Parliament was supposed to continue work on the file based on a new draft report by its rapporteur Timothy Kirkhope.

**Data retention has been illustrative of another counterterrorism instrument encountering both a great lack of consensus and controversy at various EU levels.** After heated debates at domestic and EU instances

<sup>66</sup> Protocol 36 to the EU Treaties limited some of the most far-reaching innovations introduced by the Treaty of Lisbon over EU cooperation in justice and home affairs (JHA) for a period of five years (1 December 2009 to 1 December 2014). Such limits included restrictions on the enforcement powers of the European Commission and of the judicial scrutiny of the Court of Justice of the European Union over legislative measures adopted in these fields before the entry into force of the Lisbon Treaty under the old EU Third Pillar (Title VI of the former version of the Treaty on the European Union). For a study on the main legal and political challenges and implications of the end of this Transitional Protocol refer to V. Mitsilegas, S. Carrera and K. Eisele (2014), “The End of the Transitional Period for Police and Criminal Justice Measures: Who Monitors Trust in the European Criminal Justice Area?”, CEPS Paper in Liberty and Security in Europe, Brussels.

<sup>67</sup> S. Carrera, N. Hernanz and J. Parkin (2013), “The ‘Lisbonisation’ of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice”, CEPS Paper in Liberty and Security in Europe, Brussels.

<sup>68</sup> See for instance the European Parliament (2014), Report on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs, 2013/2188/INI, 21 February.

<sup>69</sup> Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final, Brussels, 2.2.2011.

<sup>70</sup> See [www.europarl.europa.eu/news/en/news-room/content/20130422IPR07523/html/Civil-Liberties-Committee-rejects-EU-Passenger-Name-Record-proposal](http://www.europarl.europa.eu/news/en/news-room/content/20130422IPR07523/html/Civil-Liberties-Committee-rejects-EU-Passenger-Name-Record-proposal).

during its national implementation phase, the Data Retention Directive<sup>71</sup> was finally invalidated by the CJEU in its *Digital Rights Ireland* (DRI) judgment in 2014.<sup>72</sup> The Court stated that the Directive entailed a wide-ranging and particularly serious interference with the right to respect for privacy and data protection in the legal order of the EU, without such an interference being circumscribed by provisions to ensure that it is actually limited to what is strictly necessary. In view of the Court, therefore, the Directive was disproportionate and undermined the data protection requirements laid down in Article 8 of the EU Charter, and hence failed to pass the EU legality test. The CJEU also laid down a set of legal standards for any new piece of EU legislative covering data retention to be lawful.<sup>73</sup>

**It is questionable whether the recent plan of the Commission to amend the EU PNR system in accordance with the CJEU's DRI criteria** are sufficient. For example, in this plan, the Commission proposes to reduce the retention period of 'full PNR data' to seven days (instead of 30 days in the 2011 proposal) before the data are depersonalised. However, depersonalised data are not the same as anonymous data: it will always remain possible for appointed law enforcement authorities to individualise the data stored in the EU PNR system. The general continued data retention period of (depersonalised) data of all air passengers in the EU is still to be considered as disproportionately long. Furthermore, the Commission proposes an optional role of a judicial authority in the member states to oversee the transfer of personal data to other member states and third states, indicating that this is in line with the Court's request for sufficient guarantees.

That notwithstanding, **the CJEU conclusions make clear that much stricter (and mandatory) prior control of both data transfers and purpose of the use of these data is necessary.**<sup>74</sup> Finally, the Commission does not address one of the most important conclusions of the CJEU, namely that not only the proposed measure of large-scale data retention must be appropriate to attain the objective pursued, but also derogations and limitations to the right to data protection must apply only in so far as is strictly necessary.<sup>75</sup> This also remains an open challenge affecting the EU PNR initiative.

Furthermore, when addressing the links between the EU 'internal' security policies with other international instances of cooperation, careful regard should be paid to the position held by the Luxembourg Court concerning the relationship between international obligations and the respect of fundamental human rights in EU antiterrorism policies. In the *Kadi* cases,<sup>76</sup> the CJEU held EU legislation implementing UN instruments on antiterrorism incompatible with fundamental rights.<sup>77</sup>

These judicial and legal challenges have emerged in an era of Edward Snowden's revelations of large-scale surveillance systems in the US and the EU and their negative repercussions for the rights and liberties of

<sup>71</sup> Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

<sup>72</sup> Case C-293/12 & C-594/12, op. cit. For an analysis see E. Guild and S. Carrera (2014), "The Political and Judicial Life of Metadata: Digital Rights Ireland and the Trail of the Data Retention Directive", CEPS Paper in Liberty and Security in Europe, CEPS, Brussels.

<sup>73</sup> Ibid., pp. 7-8.

<sup>74</sup> C-293/12 & C-594/12, op. cit., paragraph 62: "Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits."

<sup>75</sup> Ibid., paragraphs 49-52.

<sup>76</sup> Case T-306/01 *Yusuf and Al Barakaat Foundation v. Council* and Case T-315/01 *Kadi v. Council and Commission*; Case T-85/09, *Kadi v. European Commission*, 30 September 2010; and Joined Cases C-584/10 P, C-593/10 P and C-595/10 of 18 July 2013, Court of Justice of the European Union.

<sup>77</sup> D. Bigo et al. (2015), "National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges", CEPS Paper in Liberty and Security in Europe, Brussels.



individuals around the globe.<sup>78</sup> These developments have also shed light on **the lack of proper and effective judicial scrutiny of the practices of intelligence communities across certain EU member states** when it comes to issues of electronic surveillance of communications and the uses of the concepts of national security and state secrets as ways to evade judicial accountability of intelligence communities' practices. A recent study commissioned by the European Parliament calls for tighter judicial guarantees in order to mitigate the weaknesses these concepts impose on the rights of the defence and freedom of information.<sup>79</sup>

#### 4. Conclusions and Recommendations

This Policy Brief has argued that EU policy initiatives put forward in response to the Paris attacks call for careful and cautious reflection and debate. This is based on the following two reasons. First, they are not solutions devised to respond directly to the Paris phenomena. They predate the events and have previously encountered controversy and lack of consensus due to their repercussions for rule of law and fundamental rights. Second, they are overly focused on enhancing surveillance and systematic monitoring of all citizens moving inside and outside Europe.

By doing so, they are 'ultra-solutions' rather than actual solutions.<sup>80</sup> As Watzlawick wrote ironically in 1988, an 'ultra-solution' is "a solution which is more destructive than the problem itself because it reinforces the roots of the problem and adds its own specific problems".<sup>81</sup> It is a process by which people learn "how to succeed to fail". They engage happily in it, repetitively, often because it remains unseen to the eyes of the public, and sometimes to their own eyes. They end up believing seriously that their actions have no consequences, and that all the problems come only from the other's actions.

Considered collectively, the set of initiatives put forward by EU member state representatives, European institutions and security professionals lead to fundamental contradictions. This paper has argued that EU counterterrorism responses raise two important challenges to the Union: first, to freedom of movement, Schengen and European citizenship; and second, to democratic rule of law. Proposals such as the EU PNR or the extensions of systematic border controls to citizens crossing borders in Europe stand in contravention of Schengen and the free movement paradigm.

For all these reasons, this paper concludes that EU policy-makers and security professionals should implement a cautious approach and a rational and non-emergency-induced way of policy-making on counterterrorism responses. Otherwise, the EU contribution to the Paris events will lead to more insecurity and legal uncertainty rather than security. In light of the experience and lessons learned from the rapid adoption of similarly contested measures in the past following terrorist events, it will also ultimately face rule of law and judicial accountability by relevant Courts, which will cause unrest and a disproportionate amount of effort to 'clean up' the situation at a later stage.

Instead, the EU could adopt a **new European Agenda on Security and Liberty**, which would be based on an alternative **EU security (criminal justice-led) cooperation model** firmly based on current EU legal principles and rule of law standards. The model should be built on the premise that *less is more* in what concerns the use and exchange of data by police and intelligence communities. It should call for less data retention and processing, and better and more accurate use of data that meets the quality standards of evidence in criminal judicial proceedings.

<sup>78</sup> D. Bigo et al. (2013), "Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law", CEPS Paper in Liberty and Security in Europe, Brussels. For a critique on the role of digital surveillance and big data analytics as the solution to counterterrorism, and its lack of effectiveness, refer to Z. Bauman, D. Bigo, P. Esteves, E. Guild, V. Jabri, D. Lyon and R. B. J. Walker (2014), "After Snowden: Rethinking the Impact of Surveillance", *International Political Sociology*, Volume 8, Issue 2, pp. 121-144, June.

<sup>79</sup> Bigo et al. (2015).

<sup>80</sup> D. Bigo and S. Carrera (2004), "From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU", CEPS Commentary, Brussels.

<sup>81</sup> P. Watzlawick (1988), *Comment réussir à échouer : Trouver l'ultrasolution*, Paris: Seuil.

On the basis of the above, the following **policy recommendations** are put forward:

1. A first step of a new EU security cooperation model should be for the EU to carry out an in-depth evaluation/study of the gaps in and deficits of current EU counterterrorism legislation, information systems and actors/agencies, as well as the rule of law and implementation challenges affecting their practical application.
2. The EU should develop and adopt a new evaluation mechanism similar to the one devised for the Schengen Evaluation Mechanism<sup>82</sup> but covering measures falling under the scope of police and criminal justice cooperation.<sup>83</sup> This would equip the current European Commission with the information necessary to enforce the implementation by EU member state authorities of former EU-Third Pillar legal instruments, which after the end of the transitional period are subject to full enforcement powers of the Commission and the Luxembourg Court of Justice.
3. The implications of the CJEU's *Digital Rights Ireland* judgment for initiatives such as EU PNR or the smart borders proposals should be studied carefully before adopting any new legislative measure that may face similar legal challenges before European Courts. The Commission should propose a measure on enhanced data preservation that would be in compliance with the ruling.<sup>84</sup>
4. The EU PNR proposal should not be adopted in its current form. Its value and necessity should be critically reconsidered. The CJEU has made it clear that privacy protection needs to be intrinsic to any measure that seeks to create exceptions and interferences with the EU Charter of Fundamental Rights. The EU PNR should be designed to comply with the *Digital Rights Ireland* judgment. In case it becomes clear that the EU PNR system is not only inappropriate but also not strictly necessary for the purpose of fighting terrorism and serious crime, it should be abandoned. Furthermore, before adopting the EU PNR proposal, agreement should be reached on the general data protection framework in the EU, including the rules applying to law enforcement, in order to prevent diverging levels of data protection in the EU.
5. One aspect of the Paris attacks that is particularly worrying is the availability of illicit arms like those of the attackers. Central to reducing the supply of illegal firearms is better controls. Substantial progress has been made across the EU in controlling and monitoring the availability and sale of components for explosive devices. Clearly, more efforts need to be put into controlling and monitoring access to firearms. An assessment of the gaps and challenges affecting the use of SIS II for these purposes should be carried out, in close cooperation with the European Parliament.
6. EU member states policies and initiatives on deprivation of citizenship and travel documents should be examined from the perspective of their compatibility with EU law and standards, as well as the status of citizenship of the Union. Particular attention should be paid to supranational supervision of member states' delivery of effective remedies and other procedural guarantees to those EU citizens subject to these kinds of practices. The compatibility of these policies and practices with the EU Charter of Fundamental Rights should also be carefully examined.
7. Any transnational cooperation on national security must go hand-in-hand with independent judicial accountability and democratic scrutiny of intelligence communities and law enforcement practices.

<sup>82</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

<sup>83</sup> As previously proposed in V. Mitsilegas, S. Carrera and K. Eisele (2014), "The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?", CEPS Paper in Liberty and Security in Europe, Brussels.

<sup>84</sup> As explained in Guild and Carrera (2014), *op. cit.*, p. 2, "Data preservation is a specific targeted law enforcement measure managed by judicial authorities across the EU member states and often used as a less intrusive alternative to data retention. In the case of preservation, a judge must be convinced that it is necessary in a specific case of law enforcement to quick-freeze someone's data. Thus the criminal justice systems control the issuing of data preservation orders, and these institutions are familiar with the necessity of acting within the confines of due process and fair trial".

The EU should adopt an inter-institutional EU Code for the Transnational Management and Accountability of Information in the EU addressed to the intelligence communities in the member states. Such a code could aim at ensuring that the practices of intelligence services are in accordance with fundamental rights and rule of law principles without undermining their work.<sup>85</sup>

8. An EU Observatory should be set up composed of a network of independent and interdisciplinary scholars who address questions related to extremism, radicalisation, national security, intelligence security cooperation, judicial oversight and the legality of anti-terrorism policies.<sup>86</sup>

<sup>85</sup> This proposal has been developed in Bigo (2015).

<sup>86</sup> Bigo et al. (2014).

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