The Use and Effectiveness of Migration Controls as a Counter-Terrorism Instrument in the European Union

Sarah Leonard[1]

Introduction

Since the terrorist attacks on 11 September 2001, the issue of the linkages between security concerns, in particular terrorism, and asylum and migration policies in the European Union (EU) has received an increasing amount of scholarly attention (see Guild, 2003a; Guild, 2003b; Baldaccini and Guild, 2007; Boswell, 2007; Bigo and Tsoukala, 2008; Chebel d'Appolonia and Reich, 2008a; Givens et al., 2009; Winterdyk and Sundberg, 2010). Most scholars have argued that security concerns have led to the strengthening of border controls and the tightening up of asylum and migration policies in Europe, at both the national and EU levels. As a result, it has become more difficult for asylum-seekers to receive international protection and for would-be migrants to legally move to another country (see notably Bigo and Tsoukala, 2008; Chebel d'Appolonia and Reich, 2008a; Givens et al., 2009). Thus, the impact of security concerns, including terrorism, on the EU asylum and migration policy has been rather well-documented to date. However, less attention has been given to the related, albeit different, question of the role of migration controls in the EU's counter-terrorism policy.

To a certain extent, this reflects a broader trend in the literature on counter-terrorism, which tends to focus more on counter-terrorism strategies such as the use of force or intelligence gathering than on other measures such as migration controls (see, for example, Martin, 2006; Harmon, 2008). This is actually intriguing, when one considers the potentially significant role that migration

controls can play by allowing, or not, the entry into a specific country of persons seeking to commit terrorist acts (Bullock et al., 2006: 205). In addition, the issue of migration controls may have been particularly neglected in studies of the EU counter-terrorism policy because of the commonly held perception that European countries rely less on such measures than other countries, the United States in particular (Chebel d'Appollonia and Reich, 2008b: 7).

As a consequence, the present paper aims to address this specific issue of the role of migration controls in the EU counter-terrorism policy. By 'migration controls', it is meant the controls that are exercised on those wishing to enter the territory of a specific country, such as visas and controls at the physical border sites. In the context of the EU, where internal border controls have been abolished – with a few exceptions[2] –, 'migration controls' refer to the controls exercised on non-EU nationals wishing to cross the external borders of the Member States of the EU (also known as 'third country nationals' in EU policy).[3]

The article starts by tracing back the inclusion and development of migration controls as one of the EU counter-terrorism policy instruments. Then, it examines the various migration control measures that are currently used by the EU to fight terrorism, as well as their effectiveness. As this is a very dynamic policy area, the following section examines several measures that are currently being negotiated by EU policy-makers as an indication of the new migration control measures that may become part of the EU counter-terrorism policy in the future. After showing that migration control measures have become increasingly important in the EU counter-terrorism strategy, the paper questions the extent to which this is a positive policy development when one considers both the effectiveness and the negative externalities of increased migration controls.

The Role of Migration Controls in the EU Counter-Terrorism Policy

The development of EU cooperation on counter-terrorism is a relatively recent phenomenon. Although operational cooperation on issues of internal security such as terrorism already began in the 1970s amongst European states

---

[2] Five states (France, Germany, Belgium, the Netherlands and Luxemburg) decided to abolish controls at their internal borders by signing the Schengen Agreement in 1985, which was followed by the adoption of the Schengen Convention in 1990 and led to the creation of the 'Schengen area.' Schengen provisions were later brought into the EU framework with the adoption of the Amsterdam Treaty. However, the United Kingdom and the Republic of Ireland never joined the Schengen area. Nowadays, it comprises 25 states – all the EU Member States, apart from the United Kingdom, the Republic of Ireland, Cyprus, Romania and Bulgaria, as well as three states that are not members of the EU (Norway, Iceland and Switzerland).

[3] Although EU nationals seeking to enter the EU after a stay outside the EU are subject to border controls, those are different from the migration controls that are examined in this article. EU immigration policy provisions do not apply to EU citizens, as they are subject to other legal provisions relating to free movement in the EU.

within the TREVI Group, it is only in 1993 that cooperation on terrorism was formally included in the EU framework with the adoption of the Treaty of Maastricht (Mitsilegas, 2009b: 10). However, for a few years, EU achievements in this policy area remained rather modest for a variety of reasons, a detailed examination of which is beyond the scope of this article (Argomaniz, 2009). It suffices to say that the events of 11 September 2001 gave a significant impulse to the development of EU activities against terrorism (Bures, 2006; Zimmermann, 2006; Argomaniz, 2009; Kaunert, 2007; 2010). The analysis of the role of migration control measures in the EU counter-terrorism policy will therefore focus on post-9/11 policy developments.

In the first phase of the development of the EU's post-9/11 response to terrorism, migration controls were not identified as a priority. Some measures relating to migration controls, such as the reinforcement of controls at external borders, the establishment of a network for exchanging information on visas issued and the improvement of the input of alerts into the Schengen Information System (SIS) (see below) were mentioned in the Anti-Terrorism Roadmap adopted on 26 September 2001. However, those were listed alongside 43 other measures and were not given much substance. Also, whilst the deadline for the reinforcement of controls at external borders was identified as 'as soon as possible', no deadline was stipulated for the other two measures. In addition, migration controls had not been identified as a priority by the European Council when it met in an extraordinary session on 21 September 2001 'in order to analyse the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union' (European Council, 2001a: 1). The European Council Conclusions and Plan of Action identified the priorities for the development of the EU counter-terrorism policy as follows: (1) enhancing police and judicial cooperation; (2) developing international legal instruments; (3) ending the funding of terrorism; (4) strengthening air security and (5) coordinating the EU's global action. Thus, strengthening migration and border controls was not identified as a priority in the first phase of the development of the EU's post-9/11 response to terrorism. In the first months following the terrorist attacks, the EU rather focused on enhancing police and judicial cooperation on counter-terrorism amongst EU Member States, with the adoption of important instruments such as the Framework Decision on Combating Terrorism and the European Arrest Warrant, and tackling terrorist financing (see Kaunert, 2007; 2010).

The Declaration on Combating Terrorism, adopted on 25 March 2004, in the wake of the terrorist attacks in Madrid, represented a turning point with regard to the use of migration controls in EU counter-terrorism. For the first time, migration control measures were clearly identified as a priority in the development of the EU counter-terrorism policy. Section 6 of the Declaration was entitled 'Strengthening border controls and document security' and called for '[expediting] work on measures in this area', including the establishment of the

European Borders Agency, the adoption of a Council Directive on the obligation of carriers to communication passenger data and the adoption of proposals for the incorporation of biometric features into passports and visas. In addition, Section 5 of the Declaration on 'Building on existing cooperation' emphasised the importance of 'maximising the effectiveness of information systems', most of which (Schengen Information System (SIS), Visa Information System (VIS) and EURODAC) contain data pertaining to asylum and migration matters as will be explained in greater detail below. In addition, Annex 1 of the Declaration identified seven strategic objectives for the EU to combat terrorism, the fourth of which was 'to ensure effective systems of border control' (European Council, 2004: 15). There were two main reasons for the increased emphasis placed on migration controls as an instrument of EU counter-terrorism. First of all, the location of the March 2004 terrorist attacks - on European soil, in contrast with the attacks on 11 September 2001 - had a profound effect on the EU counter-terrorism policy. These events accelerated the development of the EU counter-terrorism policy and led to a considerable expansion of its scope (Argomaniz, 2009; see also Lugna, 2006; Bossong, 2008). Secondly, the fact that most perpetrators of the Madrid terrorist attacks were non-EU nationals (first-generation migrants from Morocco in this case) led EU policy-makers to give increased attention to migration controls as a dimension of EU counter-terrorism.

In the revised Plan of Action on Combating Terrorism adopted in June 2004, the importance of ensuring effective systems of border control was once more presented as one of the seven EU strategic objectives to combat terrorism (Council of the European Union, 2004). In addition, as this Action Plan was considerably more detailed than any of its predecessors, the objectives of the EU in this policy area were presented in greater detail for the first time and most of them were assigned deadlines for their completion. In addition to this Plan of Action on Combating Terrorism, which was to be updated every six months, the EU adopted a Counter-Terrorism Strategy in December 2005. It is based on four pillars: 'prevent', 'protect', 'pursue' and 'respond.' 'Prevent' refers to activities aiming to tackle the root causes of terrorism, whilst 'protect' concerns activities aiming to decrease the vulnerability of people and infrastructures to terrorist attacks. 'Pursue' refers to the investigation of terrorist activities, whilst 'respond' concerns the reactions to terrorist attacks (Council of the European Union, 2005). Again, migration control measures were given a prominent place under the 'protect' heading as evidenced by the following excerpt of the EU Strategy:

> We need to enhance protection of our external borders to make it harder for known or suspected terrorists to enter or operate within the EU. Improvements in technology for both the capture and exchange of passenger data, and the inclusion of biometric information in identity and travel documents, will increase the effectiveness of our border controls and provide greater

assurance to our citizens. The European Borders Agency (Frontex) will have a role in providing risk assessment as part of the effort to strengthen controls and surveillance at the EU's external border. The establishment of the Visa Information System and second generation Schengen Information System will ensure that our authorities can share and access information and if necessary deny access to the Schengen area (Council of the European Union, 2005: 10).

In addition, under the heading 'pursue,' it was noted that 'the development of new IT systems such as the Visa Information System and the next generation Schengen Information System, while safeguarding data protection, should provide improved access to those authorities responsible for internal security thereby widening the base of information at their disposal' (Council of the European Union, 2005: 13). Thus, the 2005 EU Counter-Terrorism Strategy confirmed the increasing importance of migration controls as an EU counter-terrorism instrument.

Since then, an increasing number of migration control measures have been included in reports on the implementation of the EU Action Plan on Combating Terrorism and in updated versions of the Action Plan. On the one hand, this testifies to the growing importance of migration controls as an EU counter-terrorism instrument. On the other hand, it is important to emphasise that not all EU migration control measures contribute to the fight against terrorism, contrary to what their inclusion in EU counter-terrorism documents seems to suggest. The main purpose of most migration control measures is to prevent irregular migration, rather than fighting terrorism. Indeed, in recent years, several measures have been adopted to enhance cooperation on external border controls amongst Member States and to strengthen border controls. In the area of external border management, the main aim of the EU is to develop an integrated management of the borders, with a view to ensuring a high and uniform level of control of persons and surveillance at the external borders. 'Integrated Border Management' (IBM) covers all the activities of the public authorities of the Member States relating to border control and surveillance, including border checks, the analysis of risks at the borders, and the planning of the personnel and facilities required.[4]

---

[4] This concept has influenced the development of the Area of Freedom, Security and Justice since the adoption of the Tampere programme in 1999 and was precisely defined by the Council in 2006. The Council Conclusions on Integrated Border Management outlined the five main dimensions of IBM: (1) border control, which includes border checks, border surveillance and relevant risk analysis and crime intelligence; (2) the detection and investigation of cross-border crime; (3) the 'four-tier access control model' (which includes activities in third countries, cooperation with neighbouring third countries, controls at the external border sites, and inland border control activities inside the Schengen area); (4) inter-agency cooperation for border management and international cooperation; and (5) coordination and coherence of

Consequently, it can be argued that only some of the EU migration control measures significantly contribute to the EU's fight against terrorism. For example, the creation of FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) has often been presented by the EU as a significant step forward in the development of the EU counter-terrorism activities. However, its main competences are in the area of border security rather than counter-terrorism. One of its main responsibilities is to coordinate joint operations with Member States at the external borders of the EU Member States in order to prevent irregular migration. Given that it is highly unlikely that prospective terrorists would be attempting to reach the EU on one of the unseaworthy boats in the Mediterranean on which the attention of FRONTEX has been focused in the last few years, this type of activities cannot be seen as combating terrorism. The Agency also carries out risk analyses and follows up research relevant for the control and surveillance of borders. It is possible that the Agency may deal with terrorism issues when conducting these activities, but this has actually not been the focus of its work to date (Leonard, 2009). It is therefore important to identify migration control measures that contribute to combating terrorism amongst all EU migration control measures. In the next two sections, this article examines the migration control measures that are currently part of the EU counter-terrorism policy and those that are presently being negotiated in the EU and might become part of it in the future. Rather than following the all-inclusive approach characterising EU counter-documents, the article focuses on the border control measures that can make a substantial, rather than tangential, contribution to the EU's fight against terrorism.

Current Migration Control Measures used by the EU to Fight Terrorism and their Effectiveness

There are currently three main migration control measures that significantly contribute to fighting terrorism in the EU: the cooperation on visas, the sharing of Advanced Passenger Information (API) and checks at the EU external borders. The remainder of this section examines each of them in turn and briefly comments upon their effectiveness.

EU Cooperation on Short-term Visas

Before examining EU cooperation on visas, it is important to define a visa as a document issued in the country where an individual resides (or where he originates from) by the country to which (s)he wishes to go. Visa cooperation amongst EU Member States has been mainly prompted by the abolition of

the activities of the Member States and institutions, as well as other bodies of the Community and the Union.

internal border controls within the Schengen area[5]. Lifting these internal border controls meant that the holder of a visa to one of the Schengen countries was also able to freely travel to any of the other Schengen countries. This situation led EU Member States to increase their cooperation on various aspects of their visa policies. It is important to emphasise at this stage that EU cooperation on visas focuses on short-term visas (i.e. three months), such as the visas given to tourists or businessmen, although EU Member States also cooperate on some specialised visa documents (Hobolth, 2010). The key-issues on which EU Member States cooperate are the list of countries whose nationals must have a visa to enter the EU, the procedures for issuing visas, as well as the definition of a uniform visa format. Since 2001, there have been two visa lists: one 'white' list, listing countries whose nationals are not required to have a visa to enter the EU, and a 'black' list comprising the countries whose nationals are required to have a visa to cross the external borders of the EU. As of 2008, the black list comprised 130 countries (i.e. almost all the countries in the Middle East, South Asia, Central Asia and Africa). The procedures and conditions for issuing visas are defined in the Visa Code (Regulation EC 810/2009), which has recently recast previous legislation such as the old 'Schengen Decisions' and the Common Consular Instructions. In order to be granted a visa, applicants must possess valid travel documents and may be asked to justify (and document) the purpose of their visit and means of subsistence. In addition, they must not be registered in the Schengen Information System, which is a database that became operational in 1995 to support the implementation of the rules governing the Schengen area. This database notably contains alerts for the purpose of refusing entry. According to Article 21 of the Visa Code, 'particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States.' The same article also requires consulates to specifically verify that 'the applicant is not considered to be a threat to public policy, internal security or public health (…) or to the international relations of any of the Member States.' In other words, from the point of view of the fight against terrorism, the officials processing a visa application are required to ensure that the applicant does not represent a security risk, such as a terrorist risk. This is done through security controls such as a search of the entry refusal files in the Schengen Information System, as well as the consultation of the central authorities of the countries concerned.

EU Sharing of Advanced Passenger Information (API)

Further specific controls apply to persons travelling by air to the EU. Council Directive 2004/82/EC of 29 April 2004 requires Member States to establish an obligation for carriers to transmit, at the request of the authorities responsible for carrying out checks on persons at external borders, by the end of check-in,

---

[5]   See footnote 2.

information concerning the passengers they will carry. This 'advanced passenger information' (API) comprises the following: the number and type of travel document used, the nationality, the full names, the date of birth, the border crossing point of entry into the territory of the Member States, the code of transport, the departure and arrival time of the transportation, the total number of passengers carried on that transport and the initial point of embarkation.

Checks at EU External Borders

All third country nationals are subject at entry to a 'thorough check' according to the Schengen Borders Code. In addition to examining the travel documents and their validity, border guards verify the purpose and length of stay of the travellers and whether they possess sufficient means of subsistence. They also systematically search the Schengen Information System and national databases to check that travellers from a third country do not represent a threat to public policy, internal security, public health and the international relations of the Schengen states. In other words, it is tested whether several criteria are met through questions put to the travellers. Border guards also manually stamp the travel documents of third country nationals crossing the external border in order to indicate the date and place of entry and exit.

How Effective are these EU Migration Control Measures in Fighting Terrorism?

EU institutions regularly state that reinforcing migration controls, such as border controls, and EU cooperation in this policy area is important for combating terrorism. For example, a Communication of the European Commission in 2008 argued that '[b]order surveillance has not only the purpose to prevent unauthorised border crossings, but also to counter cross-border crime such as the prevention of terrorism' (Commission of the European Communities, 2008b: 3). According to the Council (Council of the European Union, 2009), '[EU Member States] need to enhance protection of [their] external borders to make it harder for known or suspected terrorists to enter or operate within the EU.' At the same time, the European Commission has also been seen as expressing some scepticism towards the effectiveness of migration controls in combating terrorism:

> [in] view of the latest terrorist acts in the EU, it can be noted that the perpetrators have been mainly EU citizens or foreigners residing and living in the Member States with official permits. Usually there has been no information about these people or about their terrorist connections in the registers, for example in the SIS or national databases (Commission of the European Communities, 2008a: 10).

To date, there has not been any systematic assessment of the effectiveness of migration control measures as an EU counter-terrorism instrument. It is nevertheless possible to offer some reflections on the effectiveness of the instruments presented above. With regard to EU cooperation on short-term visas, and with respect to travellers from the countries that are still subject to the visa obligation, the visa application system involves a first security check that is conducted before travellers have left their country of origin or residence. In theory, this type of checks can contribute to combating terrorism. However, this is difficult to assess because of the lack of availability of precise information. Data on the numbers of visas applied for and refused is available. According to Hobolth (2010), the annual refusal rate across the EU has been about 7% in the last few years. However, data documenting the reasons for which visas have been refused has not been readily available to date, as EU Member States refusing to grant a short-term visa have traditionally not been legally obliged to motivate their decision. It has therefore been impossible to identify the number of persons who have been refused a visa because they were assessed as posing a security (terrorist) threat to the EU.[6] Thus, one can argue that, in general, EU cooperation on short-term visas contributes to the EU fight against terrorism because it ensures that EU states share information on persons to whom entry should be refused, including on grounds of national security, and that such persons are subsequently refused a visa. From that viewpoint, EU visa cooperation may contribute to decreasing the terrorist threat in the EU. However, to date, it has been impossible to know how many prospective terrorists have been refused a visa, as not even the number of visas refused on security grounds has been made publicly available. Consequently, it is impossible to assess the precise contribution that short-term visa cooperation has made to the EU's fight against terrorism.

Assessing the extent to which external border checks contribute to fighting terrorism in the EU is no easier task. One of the key-aspects of these checks is the search of the Schengen Information System (SIS) to verify that travellers have not been signalled by a Member State for the purpose of denying entry. This system registers alerts regarding third country nationals who have been refused entry to the Schengen area, wanted persons, and persons to be put

---

6   However, this may change in the future as the recently adopted Visa Code (Regulation EC 810/2009) establishes for the first time rules relating to the motivation of refusal of a visa. From 5 April 2011 onwards, the authorities processing short-term visa applications will be required to motivate their refusal decision by filling in an EU standard form. The standard list of grounds for refusal notably comprises 'one or more Member State(s) consider you to be a threat to public policy, internal security, public health (…) or the international relations of one or more of the Member States.' If EU statistics on the grounds for visa refusal are published, it will therefore be possible to gain a better understanding of the number of persons who are refused visas on the ground of internal security, although it is unfortunate in that respect that 'internal security' is part of a broader category, which comprises three other grounds for refusal.

under protection. According to the website of the EU institutions (*Europa*), as of 2008, SIS contained more than 17 million records, the vast majority of which concerned lost or stolen items (e.g. identity documents). There were more than one million records concerning wanted persons, the majority of which were third country nationals who should be denied entry under Article 96 of the Schengen Convention. However, it is difficult to assess how many of these persons represent a terrorist threat, as some Schengen Member States also create records for persons whose application for asylum has been rejected (and not only for persons representing a significant threat to national security and public order). Again, this makes it extremely difficult to assess the effectiveness of border checks in the EU counter-terrorism policy. This is not to say that the current EU migration controls do not contribute to combating terrorism at all. They may have prevented prospective terrorists from reaching the EU. However, such a success is, by definition, extremely difficult to document. Thus, to date, the effectiveness of migration controls as an EU counter-terrorism instrument has not been demonstrated yet. The extent to which the various types of migration control measures adopted by the EU contribute to combating terrorism is not known and is actually very difficult to assess.

A Future Strengthened Role for Migration Controls in the EU Counter-Terrorism Policy? Current Debates in the EU

Despite the difficulty to assess the effectiveness of migration controls as a counter-terrorism instrument in the EU, the European Commission has been pressing ahead with various proposals to increase EU migration controls, which are notably, albeit not exclusively, justified with regard to their contribution to the EU's fight against terrorism. As a result, the importance of migration controls as a dimension of the EU counter-terrorism policy is set to grow even further once these instruments are adopted and implemented. Amongst the most important and relevant measures outlined below, one can note that several concern the development of databases containing data pertaining to asylum and migration matters, as well as their interconnection under the banner of 'interoperability' (see De Hert and Gutwirth, 2006).

The Development of Increasingly Sophisticated Databases and their Interconnection

In addition to a second generation of the Schengen Information System (SIS II) handling biometric identifiers, a Visa Information System (VIS) is to be set up to improve the implementation of the common visa policy, consular cooperation and consultation between the central visa authorities. Its main purposes are to verify the authenticity of the visa and the identity of its holder on entry.

The VIS will record the following data: alphanumerical data on the applicant and on the visas requested, issued, refused, annulled, revoked or extended; photographs; fingerprint data; and links to previous visa applications and to the application files of persons travelling together. The creation of the VIS was decided by a Council Decision in 2004. It was subsequently decided to give designated national authorities responsible for the prevention, detection or investigation of terrorist or other serious criminal offences, as well as Europol officials, access to VIS data through central access points (European Union, 2008). Member States considered that the information contained in the VIS may be necessary for the purposes of preventing and combating terrorism (as well as other forms of serious crime) and that it should therefore be available provided that the conditions set out in the Decision are fulfilled. Access to VIS data will normally only be granted after a duly reasoned request has been made. Only in urgent cases will verifications of the requests be carried out ex-post. In addition, personal data may be transferred to third countries or to international organisations for the purpose of preventing and detecting terrorist and other serious offences. In such cases, the consent of the Member State that entered the data into the VIS will have to be obtained.

However, despite all these legislative developments, it is important to note that the VIS is still not operational yet. The starting date of its operations has been postponed several times because of technical problems affecting the development of both the central system and VIS preparations at the national level, in three countries in particular. In order to support the implementation of the VIS, a group of 'Friends of the VIS' was established in October 2008, which is chaired by the Presidency of the Council and comprises a senior official of each state participating in the VIS, as well as a representative of the European Commission (Council of the European Union, 2008). Its main aim is to ensure the coordination of all the measures to be taken by Member States to ensure the implementation of the VIS, including the use of the system for checks at external borders and the monitoring of all technical testing activities. Despite all these efforts, the implementation of the VIS is still significantly delayed. A report from October 2009 indicates that 'the start of operations of the VIS will be delayed beyond September 2010' (Council of the European Union, 2009: 2), whilst the European Commission indicates that the VIS will be 'fully operational in 2012 at the earliest' (Commission of the European Communities, 2008: 3).

In addition, the European Commission submitted a proposal for the access of authorities responsible for internal security matters and Europol to informa-tion contained in EURODAC in September 2009. EURODAC is an existing EU database that stores the fingerprint data of asylum-seekers at the time of their request for asylum. It was created in order to facilitate the application of the Dublin Regulation, which determines the Member State responsible for exam-ining an asylum application by comparing the fingerprints of asylum-seekers.

By comparing fingerprints, Member States can determine whether an asylum-seeker or a foreign national found illegally present within a Member State has previously claimed asylum in another Member State, or whether an asylum applicant entered the Union territory unlawfully. According to the European Commission, the law enforcement authorities of some Member States consult national databases containing fingerprint of asylum-seekers for criminal investigations and 'consider the hit rate significant' (Commission of the European Communities, 2009: 2). This has therefore prompted the Commission to table a proposal to ensure that law enforcement authorities can compare fingerprint data with the fingerprint data of the other EU Member States through the use of EURODAC. This proposal is currently under negotiation in the Council working groups. However, it has been sharply criticised, notably by the European Data Protection Supervisor who deplored that it '[constitutes] a further step in a tendency towards giving law enforcement authorities access to data of individuals who in principle are not suspected of committing any crime' (European Data Protection Supervisor, 2009: 5; emphasis in the original).

An EU Passenger Name Record (PNR) System

In addition, the establishment of an EU Passenger Name Record (PNR) system is currently under discussion, following the presentation by the European Commission of a Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes (Commission of the European Communities, 2007). The Commission has presented this EU PNR system as a major tool in the fight against terrorism and organised crime (Commission of the European Communities, 2008: 4). According to its Impact Assessment study, this system would be extremely useful by (1) allowing for the identification of known terrorists and criminals (by running the PNR data against alert systems), passengers connected to a known terrorist or criminal, and 'high risk passengers' (according to specific characteristics and behavioural patterns or risk intelligence) and (2) by providing intelligence on travel patterns associations after a terrorist attack (Brouwer, 2009: 4). This proposal and its subsequent versions rewritten by the Council have proved very controversial as they raise many issues concerning data protection and human rights (Brouwer, 2009). Compared to the API covered by the 2004 Directive, the PNR data would be more extensive. Another major difference between the two instruments is that the 2004 Directive concerning the API only requires the transmission of data in response to a prior request, whereas the proposed PNR Framework Decision includes the obligation of systematically transmitting the required data for each flight concerned. This Framework Decision is still under negotiation at the time of writing.

Thus, despite the uncertainty as to the effectiveness of migration controls as EU counter-terrorism instruments, a considerable number of proposals relating

to migration controls are currently under negotiation in the EU that have largely been justified in terms of their contribution to counter-terrorism. Should they be adopted, they would further strengthen the importance of migration controls as an EU counter-terrorism instrument. It is therefore particularly important to further reflect upon the issue of their effectiveness, which also has to be balanced against their negative externalities.

'The Right Way to Go?' Effectiveness versus Externalities of Migration Controls as an EU Counter-Terrorism Instrument

As is the case with other counter-terrorism instruments, such as measures targeting terrorist financing, the effectiveness of migration controls to combat terrorism is still open to question. To date, the EU institutions have not provided any analysis of the impact and success of using migration controls in the fight against terrorism. Nevertheless, it is important to emphasise that it is particularly challenging to assess the effectiveness of migration controls to combat terrorism. This is because the best indicator of their success is the *absence* of terrorist attacks. However, it is impossible to conclusively prove that a terrorist attack did not take place because of one specific counter-terrorism instrument, rather than another, as information on non-existent terrorist attacks is by definition scarce. Nevertheless, it is important to consider this issue of effectiveness given the significant impact of some of the migration control measures adopted on important issues such as privacy and data protection.

Given these challenges, how might one attempt to evaluate the effectiveness of migration controls in the EU counter-terrorism policy? For the reasons explained above, it is not possible to measure the precise impact of migration controls on combating terrorism in the EU, but one can nevertheless examine whether such measures are likely to have a positive impact by tackling an important cause for concern. In that respect, data gathered and presented by Europol in its annual *EU Terrorism Situation and Trend Reports* (TESAT Reports) can shed light on the extent to which migration controls are an effective instrument in the EU's fight against terrorism. Table 1 presents figures of the number of failed, foiled and successfully executed terrorist attacks per type of terrorist groups in 2006-2008. It shows that the overwhelming majority of planned or successful terrorist attacks in the EU are due to separatist terrorist groups (84.8 %). A closer look at the TESAT Reports shows that the vast majority of these attacks occur in two countries, namely Spain and France, and are claimed by, or attributed to, Basque and Corsican separatist groups respectively. In Spain, ETA (*Euskadi Ta Azkatasuna*) uses violence to promote the independence of the Basque region, whereas groups such as the *Front National de Libération de la Corse* seek the independence of Corsica from

France. Given that the ethno-nationalist goals pursued by these groups are rather local and do not have a global scope, they recruit locally. It seems highly unlikely that individuals would have to cross the external borders of the EU to commit the terrorist offences associated with these separatist terrorist groups. Migration control measures are therefore inadequate instruments to prevent most terrorist attacks that take place in the EU. From this viewpoint, it can be argued that the use of migration controls by the EU to fight terrorism can only have very limited effectiveness given the nature and characteristics of the most active terrorist groups in the EU.

Table 1: Number of failed, foiled and successful executed attacks in all EU Member States per year (2006-2008) and per type of terrorist group

Year	Islamist	Separatist	Left-wing	Right-wing	Other or not specified	Total
2006	1	424	55	1	17	498
2007	4	532	21	1	25	583
2008	0	397	28	0	90	515
Total (%)	5 (0.31 %)	1353 (84.78 %)	104 (6.52 %)	2 (0.12 %)	132 (8.27 %)	1596 (100 %)

Sources: Europol (2007; 2008; 2009)

Nevertheless, it is important to acknowledge that any analysis should not only consider the occurrence of terrorist attacks, but also their severity. Separatist terrorist groups in Spain and France generally aim to cause material damage (Europol, 2008). In contrast, the attacks carried out by Islamist terrorist groups generally aim to cause mass casualties (Hoffman, 2006). Thus, although the number of Islamist terrorist attacks in the EU - be they successful, failed or foiled - has been rather limited over the last few years, their political impact has been significant. This is because of the high number of casualties caused by successful Islamist terrorist attacks, as demonstrated by the attacks in Madrid (2004) and London (2005). Although some of the perpetrators of these terrorist attacks were 'home-grown terrorists', some were third country nationals who crossed the EU external borders at some point. From that viewpoint, one may therefore argue that migration controls may be a useful counter-terrorism tool to prevent these individuals from entering the EU territory and execute deadly terrorist attacks. Even if the number of terrorist incidents associated with that type of terrorist groups is small, it is particularly important to prevent them because of the higher risk of mass casualties inherent to them.

However, this possible increase in security – which is impossible to conclusively demonstrate, as explained earlier – has to be put in balance against the negative effects of the strengthening of migration controls. Using an economics

concept, the latter can be referred to as 'negative externalities', that is, the costs experienced by unrelated parties – i.e. all the third-country nationals who are not involved in terrorist activities in this case. One can identify three main categories of negative externalities. First of all, the strengthening of migration controls has made it more difficult to travel and enter the EU, including for some *bona fide* travellers without any connection to terrorism.[7] This has notably been well-documented by scholars examining the development of the EU cooperation on visas (Bigo and Guild, 2003; 2005; Trauner and Kruse, 2008). In addition, it can be argued that using migration controls as a counter-terrorist instrument may have a harmful effect on the relations between various ethnic groups in multicultural societies by presenting asylum-seekers and migrants as potential terrorists (Guild, 2003a; 2003b). Finally, the development of migration control measures to fight terrorism raises significant questions with regard to the right to privacy and data protection. An increasing number of personal data concerning third-country nationals wishing to enter the EU is already being collected and stored. This trend will be reinforced if the new EU instruments currently under discussion are adopted and enter into force. In addition, as has been explained before, there have been several moves towards interconnecting various databases that contain some sensitive data and that were originally designed for different purposes than the fight against terrorism. This is a controversial development with regard to data protection (Mitsilegas, 2007; Mitsilegas, 2009a).

Conclusions

This article has demonstrated that migration controls have become an increasingly important component of EU counter-terrorism policy over the last few years. After the terrorist attacks on 11 September 2001, strengthening EU cooperation on migration controls was identified amongst various actions to be taken, but was not given any priority. It is only after the terrorist attacks in Madrid in March 2004 that it was identified as a strategic objective in the EU fight against terrorism. Since then, this dimension of the EU counter-terrorism policy has continued to grow in importance. This trend is set to continue in the future, as a significant number of proposals regarding migration control measures are currently being negotiated in the EU.

However, this article has showed that the development of these initiatives has not been justified by any systematic analysis of the success of migration controls as a counter-terrorism instrument. The EU has not demonstrated the

---

[7]   It is important to note that the European Commission has implicitly acknowledged this problem when tabling a new 'border package' in February 2008 (Commission of the European Communities, 2008). It has suggested addressing it by taking measures to facilitate border crossing for *bona fide* travellers, such as the introduction of a 'Registered Traveller' status and a simplified and automated border check.

effectiveness of migration controls in the fight against terrorism, although this article has acknowledged the considerable challenges inherent to such a demonstration. Nevertheless, whilst it is unclear to which extent reinforced migration controls contribute to combating terrorism, it has become increasingly evident that they have negative externalities, notably as far as the right to privacy and data protection are concerned. The creation of an expanding number of databases containing data pertaining to asylum and migration matters and the emphasis put on their 'interoperability' for use in the fight against terrorism are particularly good examples. Given the lack of robust justification for and demonstration of the effectiveness of using such instruments for fighting terrorism, it might therefore be argued that resources and energy may be better spent by focusing more closely on those involved in terrorist activities, through the enhanced sharing of intelligence for example, rather than adopting measures negatively affecting all third-country nationals indiscriminately.

References

Argomaniz, J. (2009) 'Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia', *European Security*, 18(2): 151-172.

Baldaccini, A. and E. Guild, eds (2007) *Terrorism and the Foreigner*. Leiden: Martinus Nijhoff.

Bigo, D. and E. Guild, eds (2003) *La mise à l'écart des étrangers: La logique du visa Schengen*. Paris: L'Harmattan.

Bigo, D. and E. Guild (2005) 'Policing at Distance: Schengen Visa Policies' in Bigo, D. and E. Guild, eds, *Controlling Frontiers: Free Movement Into and Within Europe*. Aldershot: Ashgate.

Bigo, D. and A. Tsoukala, eds (2008) *Terror, Insecurity and Liberty*. London: Routledge.

Bossong, R. (2008) 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance', *Journal of Common Market Studies*, 46(1): 27-48.

Boswell, C. (2007) 'Migration Control in Europe after 9/11: Explaining the Absence of Securitization', *Journal of Common Market Studies*, 45(3): 589-610.

Brouwer, E. (2009) 'The EU Passenger Name Record (PNR) System and Human Rights: Transferring Passenger Data or Passenger Freedom?', *CEPS Working Document No. 320*, September 2009.

Bullock, J. A. et al. (2006) *Introduction to Homeland Security*, 2nd edition. Oxford: Elsevier Butterworth-Heinemann.

Bures, O. (2006) 'EU Counterterrorism Policy: A Paper Tiger?', *Terrorism and Political Violence*, 18: 57-78.

Chebel d'Appollonia, A. and S. Reich, eds (2008a) *Immigration, Integration, and Security: America and Europe in Comparative Perspective*. Pittsburgh, PA: University of Pittsburgh Press.

Chebel d'Appollonia, A. and S. Reich (2008b) 'The Securitization of Immigration: Multiple Countries, Multiple Dimensions' in Chebel d'Appollonia, A. and S. Reich, eds, *Immigration, Integration, and Security: America and Europe in Comparative Perspective*. Pittsburgh, PA: University of Pittsburgh Press, 1-22.

Commission of the European Communities (2008) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Preparing the Next Steps in Border Management in the European Union*, SEC (2008) 153, SEC (2008) 154, 13 February 2008.

Commission of the European Communities (2009) *Proposal for a Council Decision on Requesting Comparisons with EURODAC data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes*, COM (2009) 342, SEC (2009) 936, SEC (2009) 937, 10 September 2009.

Council of the European Union (2004) *EU Plan of Action on Combating Terrorism*, Doc. 10010/3/04, 11 June 2004.

Council of the European Union (2005) *The European Union Counter-Terrorism Strategy*, Doc. 14469/4/05, 30.11.2005.

Council of the European Union (2008) *Draft Council Conclusions on a Group of 'Friends of the VIS'*, Doc. 14629/08, 23 October 2008.

Council of the European Union (2009) *Programme of Deployment of the VIS – Activities of the Group of Friends of the VIS*, Doc. 14340/09, 12 October 2009.

De Hert, P. and S. Gutwirth (2006) 'Interoperability of Police Databases within the EU: An Accountable Political Choice?', *International Review of Law Computers & Technology*, 20: 1-2, 21-35.

European Council (2001a) *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001*, Doc. SN 140/01.

European Council (2001b) *Anti-Terrorism Roadmap*. Doc. SN 4019/01.

European Council (2004) *Declaration on Combating Terrorism*, 25 March 2004.

European Data Protection Supervisor (2009) *Opinion of the European Data Protection Supervisor on the Amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...], and on the Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes.*

European Union (2004) *Council Directive 2004/82/EC of 29 April 204 on the Obligation of Carriers to Communicate Passenger Data*, Official Journal of the European Union, L 261/24, 6 August 2004.

European Union (2008) *Council Decision 2008/633/JHA of 23 June 2008 Concerning Access for Consultation of the Visa Information System (VIS) by Designated Authorities of Member States and by Europol for the Purposes of the Prevention, Detection and Investigation of Terrorist Offences and of Other Serious Criminal Offences*, Official Journal of the European Union, L 218/129, 13 August 2008.

European Union (2009) *Regulation EC 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, Official Journal of the European Union, L 243/1, 15 September 2009.

Europol (2007) *EU Terrorism Situation and Trend Report 2007*. The Hague: Europol. Available at www.europol.europa.eu

Europol (2008) *EU Terrorism Situation and Trend Report 2008*. The Hague: Europol. Available at www.europol.europa.eu

Europol (2009) *EU Terrorism Situation and Trend Report 2009*. The Hague: Europol. Available at www.europol.europa.eu

Guild, E. (2003a) 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001', *European Foreign Affairs Review*, 8(3):331-346.

Guild, E. (2003b) 'Immigration, Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001' *in* Gökay, B. and R. B. J. Walkers, eds, *11 September 2001: War, Terror and Judgement*. London: Frank Cass, 176-194.

Harmon, C. C. (2008) *Terrorism Today*, 2nd edition. London: Routledge.

Hobolth, M. (2010) 'Wanted and Unwanted Travellers: Similarities and Differences in European Visa Practices', *Paper presented at the EUSIM Conference*, University of Salford, January 2010.

Hoffman, B. (2006) *Inside Terrorism*. New York, NY: Columbia University Press.

Kaunert, C. (2007) '"Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission', *Journal of European Integration*, 29(4): 387-404.

Kaunert, C. (2010) 'The External Dimension of EU Counter-Terrorism Relations: Competences, Interests, and Institutions', *Terrorism and Political Violence*, 22: 41-61.

Leonard, S. (2009) 'The Creation of FRONTEX and the Politics of Institutional Design in the EU External Borders Policy', *Journal of Contemporary European Research*, 5(3): 335-356.

Lugna, L. (2006) 'Institutional Framework of the European Union Counter-Terrorism Policy Setting', *Baltic Security & Defence Review*, 8: 101-127.

Martin, G. (2006) *Understanding Terrorism: Challenges, Perspectives, and Issues*, 2nd edition. London: Sage.

Mitsilegas, V. (2007) 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in Baldaccini, A., Guild, E. and H. Toner, eds, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*. Oxford: Hart, 359-394.

Mitsilegas, V. (2009a) 'Borders, Security and Transatlantic Cooperation in the Twenty-First Century: Identity and Privacy in an Era of Globalised Surveillance' in Givens, T. E., Freeman G. P. and D. L. Leal, eds, *Immigration Policy and Security: US, European and Commonwealth Perspectives*. London: Routledge, 148-166.

Mitsilegas, V. (2009b) *EU Criminal Law*. Oxford: Hart.

Trauner, F. and I. Kruse (2008) 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood', *CEPS Working Paper No. 290*. Brussels: Centre for European Policy Studies.

Winterdyk, J. A. and K. W. Sundberg, eds (2010) *Border Security in the Al-Qaeda Era*. Boca Raton, FL: CRC Press.

Zimmermann, D. (2006) 'The European Union and Post-9/11 Counterterrorism: A Reappraisal', *Studies in Conflict and Terrorism*, 29(1): 123-145.