UACES 44th Annual Conference

Cork, 1-3 September 2014

www.uaces.org

UACES Conference, Cork, 2014.
Session 4, Panel 414.

The review of the EU counter-terrorism strategy – a legal appraisal.

Dr. Maria O'Neill,
Senior Lecturer in Law,
University of Abertay,
Bell Street,
Dundee DD1 1HG
Scotland, UK.
E-mail: m.oneill@abertay.ac.uk

The EU is planning for the post-Stockholm programme AFSJ. The Lisbon Treaty transfer of the Police and Judicial Co-operation in Criminal Matters from the third pillar to the new unitary structure, bringing with it the supremacy and direct effect of post-Lisbon EU law, the upgrade in legal status of the EU Charter of Fundamental Rights 2000, the procedural rights road map and the judicialisation of the AFSJ, in particular post December 2014, will all have a considerable impact on the operation of "protect" and "pursue" aspects of the current EU counter-terrorism strategy.

The traditional constructivist approach to the development of EU security strategies is now encountering an increasing constitutionalisation of the EU legal framework, highlighting significant legal tensions. In addition gaps in the EU counter-terrorism strategy still need to be addressed, in particular in countering the so called "lone wolf" terrorist in cyberspace. Revelations as to states potential for mass surveillance, via Wikileaks, raises both data protection and data security issues, also need to be addressed. A review of the legal framework is called for, in order to both strengthen capacity, and reinforce the legal system. This paper will critically address some of these issues from an EU law perspective.

Judicialisation, AFSJ, counter-terrorism strategy, data protection, data security.

Introduction

The review of the counter-terrorism strategy, in a period of calm in contrast to its original development in the post 9/11 era, allows for some of the gaps in its approach to be redressed. In addition the much changed legal landscape in which it is now to operate post-Lisbon needs to be taken into account. The traditional constructivist approach to the development of EU security strategies is now encountering an increasing constitutionalisation of the EU legal framework, highlighting significant legal tensions. Constructivism, taking the approach that "social realities only exist by human agreement through intersubjective understanding, and are therefore susceptible to change"[1] has served the construction of the Police and Judicial Cooperation in Criminal Matters (PJCCM) aspects of the Area of Freedom, Security and Justice (AFSJ), whether that mutual construction of understanding has

[1] Paul James Cardwell; EU External Relations and System of governance The CFSP, Euro-Mediterranean Partnership and Migration, Routledge 2009, p. 75.

happened at either the individual, following Onuf's approach,[2] or institutional level, both being highly relevant in the construction of a completely new way of cross-border law enforcement provisions, in particular. Much of the academic discourse to date focusing on constructivism and the EU has focused on the EU-member state relationship, missing much of the detail involved in the construction of completely new areas of operation, such as transnational law enforcement, where the individual has had a major impact in designing what were essentially ground up initiatives, which only later were adopted by the member states, and legislated for in a top down fashion. The activities of the Police Working Group on Terrorism and TREVI are cases in point, as is the original construction of the European Drugs Unit, which started operating before its underpinning legislation was enacted, and which eventually became Europol. Less constructivist, and more grounded in individual member states norms has been the judicial cooperation in criminal matters, although a constructivist approach can be also traced through these developments, with Walker and Tierney referring to "the infiltration of criminal law into the European transnational constitutional mosaic" as being "gradual and 'bottom up'."[3]

However the new legal framework of the EU post Lisbon is requiring the development of a new approach, to dovetail with the pre-existing constructivist approach, which has far from run its course, that of constitutionalism. There are many schools of thought housed under the umbrella term, "constitutionalism", with the European Court of Justice (ECJ) has previously characterised the commercially focused EC treaty as being of a "constitutional character" in *Partie Ecologiste "Les Verts"*[4] and "constitutional charter" in *Opinion 1/91*.[5] In contrast, however, to the old EC pillar the AFSJ "raises important challenges for human rights",[6] needing greater clarity to be developed in the constitutional character or constitutional charter of what is now the post-Lisbon treaty framework, for law enforcement in general, and counter-terrorism in particular.

The development of a constitutionalisation approach in the AFSJ, requires further clarification, as Shaw has argued that "constitutionalism … is troubling to the EU",[7] particularly in light of the failure of the "Draft European Constitution", and the clear understanding that the EU is not heading towards a United States of Europe. Traditionally a constitution is seen as comprising two to three parts, the first "the structure composition, functions and other inter-relationships of the principal organs of state",[8] secondly, fundamental rights, which although "these rights may be invoked against a private individual, in fact .. they are [usually] opposed to some organ" of the state.[9] The third element, which may or may not be present, is a statement of "national beliefs, ideals and aspirations".[10] The

---

[2] Vendulka Kubáklová; Twenty Year's Catharsis, in Vendulka Kubáklová, Nicholas Onuf, Paul Kowert, eds. International relations in a Constructed World. M.E. Sharpe, New York, 1998, p.52.
[3] Neil Walker and Stephan Tierney, Chapter 1 Introduction, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 17.
[4] Case 294/83 *Parti Ecologiste "Les Verts"* v. *European Parliament* [1986] ECR 1339, para 23 of the judgment.
[5] *Opinion 1/9, Draft Agreement relating to the creation of the European Economic Area*, [1991] ECR I-6079, 6102, para. 21.
[6] Sionaidh Douglas Scott, Chapter 5 Europe's Constitutional Mosaic: Human Rights and the European Legal Space – Utopia, Dystopia, Monotopia or Polytopia?, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 123.
[7] Jo Shaw; Postnational constitutionalism in the European Union, Journal of European Public Policy 6:4 Special Issue 1999: 579-97, at page 582.
[8] David Gwynn Morgan, Constitutional law of Ireland, The Round Hall Press, 1985, page 11.
[9] Ibid.
[10] Ibid. page 12.

first two of these elements are clearly set out at an EU level, with the EC and EU treaties historically and Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) more recently setting out the structure, composition, function and inter-relationships of the organs of the EU, and their interaction with individual EU member states. More recently, in particular post-Lisbon, the fundamental rights of the individual, in particular *vis á vis* the organs of the EU, have been set out in the EU Charter of Fundamental Rights (CFR), and the role of the European Convention on Human Rights (ECHR) has been concretised in EU law in the proposed accession of the EU to the ECHR. Although based in secondary law rather than in primary law, the development of the procedural rights road map can also be added to this mix.

Some may argue that the failure of the Draft Constitutional Treaty means that the EU operates in a non-Constitutional way. The term "Constitution" in political and legal matters has two different uses, one is in a "wide and abstract sense" referring to a "system of laws, customs and conventions which create and validate the organs of government and which regulate the interaction of those organs with one another and with the individual",[11] much as the UK constitution has traditionally been referred to. In a more "narrow and concrete sense" the term "Constitution" refers to "the document or documents in which the basic legal rules of the constitution are authoritatively declared". [12] While the EU may well lack a document labelled "Constitution", it clearly has a "document or documents" which set out rights which may be invoked both against other private individuals and against organs of the EU "state". The role of a senior court, normally a Supreme Court or Constitutional Court in protecting those individual rights, can be seen reflected in the approach of the Court of Justice (CoJ) to these "constitutional documents" of the EU, even if the CoJ also has other roles to perform in the EU legal structure. Equally, if there is a perception of a lack of clear "static legal hierarchies", it is possible to use the conception of "constitutionalism in term of a process".[13] There is clearly a constitutionalisation in process, through the role of the role of the CoJ in interpreting document, which may or may not be regarded as the "constitutional documents" of the EU. Whether these documents are in fact "constitutional documents" is further muddied by the treaty red lines,[14] in particular, in the AFSJ, clearly limiting the competence of the EU to engage in issues which are central to individual member state sovereignty and identity, such as national security[15] and the maintenance of internal security of individual member states.[16] In addition, the balance of the activities of the AFSJ are subject to the principle of subsidiarity,[17] further limiting the activities of the EU, and the CoJ in these areas. Nevertheless, there is a need for the EU to establish its values in the area of criminal law and cross border law enforcement, to include counter-terrorism, given that it is active in this area, with Nuoto, stating that criminal law, "is replete with values and ideologies, which are had to avoid wherever and however the field is addressed."[18] These values and ideologies are not yet

[11] Brian Doolan, Constitutional Law and its Constitutional Rights in Ireland, 3rd edition, Gill & Macmilan Ltd. 1994, at page 1.
[12] Ibid.
[13] Cormac Mac Amhlaigh, Chapter 2 The European Union's Constitutional Mosaic: Big "C" or small "c", Is that the Question?, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 28.
[14] E.g. Article 4.2 TEU.
[15] Article 73 TFEU.
[16] Article 72 TFEU.
[17] Article 4.2(j) TFEU.
[18] Kimmo Nuotio, Chapter 12 European Criminal Law under the Developing constitutional Setting of the European Union, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 332.

fixed at the EU level, with the basic principles of the EU, set out in particular in the EU Charter, but also in the ECHR and the shared constitutional traditions of the EU member state, still needing to be robustly built into the EU AFSJ legal framework. Mac Amhlaigh uses an interesting term of constitutionalism, referring to it as "as a forum for contestation regarding the values of the political community, where reasonable disagreement is articulated and debated."[19]

The Onuf's constructivist approach, of the constant making sense of the world, and negotiating that understanding greatly assists the development of structures from new, a number of new initiatives still being on the drawing board, but will not assist in the protection of individual rights, which require a more concrete, and less fungible understanding of standards and norms. This relationship between the preceding constructivist model, subsequently followed by a constitutionalism, in the rebalancing of the AFSJ, which to date has a much more developed security pillar, than freedom or justice provisions, may well lead to a reflexive relationship, with the constitutionalisaiton of standards and norms by the courts, in particular in the post Lisbon legal framework, may lead to further construction of shared understandings of what it is to operate within the EU's AFSJ. Nevertheless there is a need for the constitutionalisation of the AFSJ to now come to the fore. Some academics have already approached the AFSJ "as part of the constitutional authority of the EU",[20] although Gibb's argument, writing in 2011, is that "there is a "precarious" balance "between an instrumental and a constitutional understanding of the public goods of freedom, security and justice". However, new threats in the on-line world, continue to require Onuf's constructivist approach. As a counter-point, however, public disquiet at recent revelations dealing with mass data processing and surveillance also need to be addressed, particularly in light of Article 8 CFR, protection of personal data.

There have been major changes to the underlying legal framework for the EU's AFSJ, which is home to both the "protect" and "pursue" aspects of the EU's counter-terrorism (CT) strategy.[21] The "pursue" aspects of the CT strategy are less mired in controversy and public debate than the traditional "protect" counter-terrorism activities, whether they be conducted by either the law enforcement or security and intelligence services of individual member states. The post-Lisbon treaty framework makes the AFSJ supreme, having direct effect, and from December 2014,[22] fully justiciable by the CoJ in Luxembourg. In addition the EU CFR gained a substantial upgrade in legal status with the Lisbon Treaty, now being fully judiciable. Williams has argued that the CFR "is a more complete instrument than the ECHR in terms of contemporary notions of the scope and objects of human rights while embracing the history and form of the [ECHR]."[23] While both the UK and Poland (and possibly also the Chez Republic) have opt outs on this upgrade, the detail of the relevant protocol appears to point to a difference in approach to employment law rights rather than those rights relevant to

[19] Cormac Mac Amhlaigh, op. cit. page 29.
[20] Alun Howard Gibbs "Constitutional Life and Europe's Area of Freedom, Security and Justice, Asghate, Surrey, 2011, page 83.
[21] The EU Counter-Terrorism Strategy, Brussels, 30th November 2005. SEC 14469/4/05 REV 4.
[22] After the expiry of the five year phase in period, pursuant to Protocol no. (No 36) on Transitional Provisions, Article 10, 1-3, 10 4 and 5 of this protocol with the proposed UK opt out from pre-Lisbon AFSJ provisions, but not their post-Lisbon amendments.
[23] Andrew Williams Chapter 4 Burying, not Praising the European Convention on Human Rights: A Provocation, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 94.

justice or law enforcement.[24] While EU accession to the ECHR still has to be finalised and approved, the new legal framework, the new role of the CoJ, and the upgrade of the CFR is anticipated to have a profound effect on the development and application of the AFSJ legal framework, going forward. While this new legal reality has been foreshadowed by pre-Lisbon EU case law, the new line of case law is only now being developed.

New issues are also emerging which were not to the fore in drafting the original counter-terrorism strategy. In particular, the facilitation of terrorism on-line needs to be addressed at the EU level. Equally the mass processing of data being facilitated by modern technologies also needs to be legislated for and adjudicated on at both the regional (EU and Council of Europe (CoE)) and member state level. Mass surveillance of citizens will not be accepted in a liberal democracy, by either society, or within the EU, by its legal system. Profiling "raises a number of concerns related to the presumption of innocence, privacy and data protection."[25] Effective but appropriate oversight mechanisms need to be put in place for both law enforcement and counter-terrorism activities. From the security side of the argument, the limited resources of both the law enforcement and intelligence communities,[26] mass surveillance is not effective. It is important that the law enforcement and counter-terrorism communities maintain the support of the general public, to include any particular sub-group of that community which, whether due to ethnic, religious or political difference, are currently of concern. The radicalisation of entire communities is counter-productive, and is only going to make a particular terrorism problem worse.

New EU legal framework in the AFSJ

Given the restrictions on the role of the then ECJ by Article 35 EU pre-Lisbon, there have been very few court rulings on the pre-Lisbon PJCCM measures. The two important cases were *Maria Pupino,*[27] and what is now the series of *Kadi* cases. The 2008 ruling of the Grand Chamber in *Kadi*[28] is of particular importance in the context of how the EU views counter-terrorism provisions within its own legal framework. Echoing the European Court of Human Rights (ECtHR) ruling in *Brannigan*,[29] Advocate General Maduro stated that "extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions", however "where the risks to public security are believed to be extraordinarily high" there is a requirement on the courts to "fulfil their duty to uphold the rule of law with increased vigilance".[30] It would be expected, such as during the course of an attack, that emergency measures might have to be taken in the context of counter-terrorism, but that in the absence of such an emergency situation, as with Kadi, the

[24] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
[25] Quirine Eijkman, Bart Schuurman, Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation, , June 2011, International Centre for Counter-Terrorism, the Hague, 8.
[26] Jerry Ratcliffe; Intelligence-Led Policing, Willan, 2008, 63.
[27] Case C-105/03, *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), in criminal proceedings against Maria Pupino*, OJ C 193, 06/08/2005, 3.
[28] Joined Case C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakatt International Foundation* v. *Council and the Commission*, [2008] ECR p.I-06351.
[29] *Brannigan and McBride* v. *the United Kingdom*, app no 5/1992, 26-5-1993, paragraph 43.
[30] Joined cases C- 402/05 P and C-415/05 P, Opinion of Advocate General Maduro in *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, [2008] ECR 2008, I-06351, at para 35 of his opinion.

accused or suspect terrorist is entitled to his or her full range of fundamental, human and due process rights.

The Lisbon Treaty brings the whole of the EU's AFSJ under the oversight of the now renamed CoJ of the EU. In addition the EU CFR, in particular Chapter 6, which deals with justice, has now been given treaty status under Article 6.1 TEU,[31] and the EU is expected to accede, in its own right, to the ECHR. This is a radical change in legal status for AFSJ provisions within the EU legal framework. As Dine has pointed out the "relationship between national criminal law, EU criminal provisions, the jurisprudence of the European Court of Human Rights and the impact of the Charter [is] likely to fuel a highly complex debate."[32] Key charter provisions in the context of this paper are the Article 6 right to liberty and security, which needs to be balanced with the Article 7 right for private and family life, the Article 8 right to the protection of personal data, and the due process rights covered by Articles 47 to 49. In this context it has to be noted that the general perception is that the security provisions of the EU are much more developed than the freedom and justice provisions, which now need to catch up, in order to have a properly balanced AFSJ. A number of cases of direct relevance to the AFSJ however, are already emerging, such as the *Digital Rights Ireland* case,[33] discussed below. As Cartabia has pointed out, the Charter had given a new lease of life to the "creative ability of the European Court" pre-Lisbon.[34] Fundamental rights at an EU level are not however absolute. There are a number of limitations, with the *Schräder* case[35] holding that rights are not unfettered, but "must be viewed in the light of the social function of the activities protected thereunder".[36]

At the due process level, the pre-Lisbon ECJ referred to "a complete system of legal remedies and procedures" based on the then EC treaty, enabling "the Court of Justice to review the legality of acts of the institutions".[37] Many would question whether the complete system of legal remedies are, even now, really in place in the context of cross border justice and law enforcement. There is no doubt that the CoJ, post Lisbon, will endeavour to fill any remaining gaps in this area, taking a constitutionalist approach, with all EU measures needing to ensure that they are fully lawful and fully consistent with "fundamental rights".[38] The ECHR is also to have "special significance" in this context.[39] It is important to note that rights considered standard in many EU member states, "such as the right to remain silent, to have access to the file and to call and/or examine witnesses or experts" are not available in all

---

[31] As elaborated further in Protocol (No. 8) Relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, attached to both the TEU and the TFEU.

[32] J. Dine; Criminal Law and the Privilege Against Self-Incrimination, p. 269, Chapter 11 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, 270.

[33] Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*, and *Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, OJ C 175, 10/06/2014 p. 6.

[34] M. Cartabia: Europe and Rights: Taking Dialogue Seriously, European Constitutional Law Review, 5: 5-31, 2009, 8.

[35] Case 265/87; *Schräder* v. *Hauptzollamt Gronau* [1989] ECR 2237 at 15.

[36] Ibid.

[37] Joined Cases C-402/05 P and C-415/05 P: *Yassin Abdullah Kadi, Al Barakatt International Foundation* v. *Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351, paragraph 281 of the ruling.

[38] Ibid. paragraph 304 of the ruling.

[39] Ibid.

EU member states.[40] The EU's Fundamental Right's Agency (FRA) has been tasked under the Stockholm Programme Action Plan to cover judicial and police cooperation in criminal matters in its multiannual framework. The general consensus is that Articles 47 to 49 of the Charter are likely to "have a huge influence as they set the framework for the EU's action" in ex. Police and Judicial Co-operation in Criminal Matters (PJCCM) matters.[41] Article 48 covers the "presumption of innocence and right of defence". It is clearly a spin off from the Article 47 "right to an effective remedy and a fair trial". However, as pointed out by the European Parliament,[42] this is a pre-Lisbon Treaty right under *Johnston*[43] and *Pecastaing*.[44] The post-Lisbon oversight role of the CoJ will, however, have its limitations. It can only overview those areas of AFSJ competences which have actually been transferred by member states to the EU under the treaties, as discussed above.

The CoJ will necessarily be required to give preliminary rulings in ex. PJCCM matters, "where law and order and internal security occupy the centre stage".[45] There will be a need for new judicial practices to develop, allowing the CoJ to rule on the substance of EU law, but not crossing the red lines of member state internal security provisions. Outside the treaty based red lines this subject matter is an area of shared competence,[46] subject to the principle of subsidiarity. The general view here is that "subsidiarity and proportionality are likely to be raised more often" post-Lisbon, with greater likelihood of success.[47] As pointed out by Fletcher, Article 263 TFEU brings both Europol[48] and Eurojust[49] within the ambit of judicial review actions at the CoJ,[50] as the actions of both these bodies clearly are "intended to produce legal effects *vis-à-vis* third parties",[51] with natural or legal persons being able to institute judicial review proceedings against acts "addressed to that person or which is of direct or individual concern to them".[52]

Another EU legal development in this context, the Procedural Rights road map[53] has been drafted, with a number of its proposals already in force. At the time of writing there is a

---

[40] Laurens van Puyenbroeck and Gert Vermeulen; Towards minimum procedural guarantees for the defence in criminal proceedings in the EU, International and Comparative Law Quarterly, Volume 60, Issue 04, October 2011, pp. 1017-1038, 22.
[41] Ester Herlin-Karnell; The Constitutional dimension of European Criminal Law, Hart Publishing Ltd. 2012, 38.
[42] European Parliament Fact Sheets, 2.1.1. Respect for fundamental rights in the EU – general development, available at http://www.europarl.europa.eu/factsheets/2_1_1_en.htm .
[43] Case 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] 1651, at para 19.
[44] Case 98/79 *Pecastaing* v *Belgium* [1980] ECR 691, at para 10.
[45] Hinarejos, A.; Law and order and internal security provisions in the Area of Freedom, Security and Justice: before and after Lisbon, chapter 9 of Christina Eckes and Theodore Konstadinides (eds). Crime within the Area of Freedom, Security and Justice, A European Public Order, Cambridge University Press, 2011, 271.
[46] Article 4.2.j TFEU.
[47] Fletcher, M., EU criminal justice: beyond Lisbon, chapter 1 in Christina Eckes and Theodore Konstadinides (eds.); Crime within the Area of Freedom, Security and Justice A European Public Order, 10 – 42, 22, referring to Sir Francis Jacobs in House of Lords Select Committee, "The Treaty of Lisbon: An Impact Assessment", para. 11.43.
[48] Article 88 TFEU.
[49] Article 85 TFEU.
[50] Fletcher, M., op. cit. p.40.
[51] Article 263(1) TFEU.
[52] Article 263(1) TFEU.
[53] Adopted 30th November 2009, and incorporated in the Stockholm Action Plan, COM (2010) 171 of 20.04.2010.

directive in place giving the right to translation and interpretation services,[54] and a proposed directive on the right to access to a lawyer in criminal proceedings, and the right to communicate with one on arrest.[55] The right to legal aid in cross border civil and commercial matters[56] has already been recognised. It can be expected that one will follow for criminal matters. Some of the procedural rights of individuals, in the absence of the person concerned at the trial, are already provided for.[57]

Current proposals for legislation of relevance to the investigation/ pre-trial proceedings include a green paper on the *ne bis in idem* (double jeopardy) principle,[58] a green paper on procedural safeguards for suspects and defendants in criminal proceedings,[59] and what was a proposal for a Council Framework decision on procedural rights.[60] This latter document will probably re-emerge as a proposed directive, post-Lisbon. There is also some work on-going on "the feasibility of an index of third-country nationals convicted in the European Union".[61] Other provisions at, and post-conviction are also in the pipeline. The recent directive on victims' rights[62] is also likely to have a profound effect. Other EU case law will prove useful in filling in some of the gaps in the only partially enacted road map on procedural rights. Lenaerts has undertaken a study of pre-existing rights under ECJ case law which could be used.[63] As Herlin-Karnell has pointed out, the principle of legality and proportionality of criminal offences and penalties, while "codified in Article 49 of the Charter",[64] has already appeared in a number of pre-Lisbon cases, such as *Pupino*.[65] She has said that "the issue is far more complicated when dealing with procedural legality in the context of criminal law cooperation,"[66] expressing concern over the high level of development of the EU's security provisions in comparison to its freedom and justice provisions. It is to be expected that the CoJ will be anxious to rebalance this equation as quickly as possible.

---

[54] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26/10/2010, 1.
[55] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326.
[56] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31/01/2003, 41.
[57] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27/03/2009, 24.
[58] Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings, COM (2005) 696 final.
[59] Green paper form the Commission, Procedural Safeguard for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75.
[60] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.
[61] Commission working document on the feasibility of an index of third-country nationals convicted in the European Union, COM (2006) 359 final.
[62] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.
[63] Lenaerts, K., The contribution of the European Court of Justice to the area of freedom, security and justice, International & Comparative Law Quarterly, 2010, I.C.L.Q. 2010, 59(2), 255-301.
[64] Ester Herlin-Karnell, op. cit. p.54.
[65] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR 2005 p. I-05285.
[66] Ester Herlin-Karnell, op. cit. p.54.

An emerging issue – cyber-facilitated terrorism.

New technologies are posing new challenges in both cross-border law enforcement and counter-terrorism. While the issues of cyber-terrorism and on-line radicalisation are getting much attention, the issue of cyber-facilitated terrorism should not be overlooked. Cyber facilitated terrorism, whether through young people being "radicalized on the internet",[67] a technique being used by Al Qaeda,[68] or likeminded people networking through the "Dark Web",[69] and the facilitation of terrorist acts through the internet, requires further examination in a transnational context. This issue has been acknowledged by the EU Counter-Terrorism co-ordinator, in his 2012 annual report, when he acknowledged that the two topics for discussion that year were the "phenomenon of the lone individual involved in terrorism (lone wolf)" and "social networks in a terrorism context".[70]

While counter-terrorism activities appear to be more successful against networks, increasingly it is the lone wolf, both from the anticipated or unanticipated directions that are taking us by surprise. Barak Obama acknowledged this issue in a CNN interview in August 16th, 2011.[71] Weimann argues that further study of the lone-wolf, something which has been lacking to date, might well lead to a greater understanding of his/her "reliance on modern communication platforms,"[72] and the development of a conclusion that the "lone wolf" is not in fact "so lonely". He argues that their apparently "solitary actions [are not taking] place in a vacuum",[73] but rather in the context of being "motivated, taught, recruited, incited or even trained by external sources".[74] For example the use of the terrorist finance tracking provisions (TFTP) just after the Breivik attack in Norway identified "previously unknown associates and supporters" through tracing financial transactions.[75]

Other "lone wolves" may show some elements of "psychological disturbance" bringing the health services into the anti-radicalisation picture,[76] and also the prison services, with radicalisation, in several cases, having happened in prison.[77] Weimann points out that law

---

[67] Weimann, G.; Lone Wolves in Cyberspace, Journal of Terrorism Research, Vol. 3, Issue 2 (2012), available at http://ojs.st-andrews.ac.uk/index.php/jtr/article/view/405/431, 1.
[68] EU Counter-Terrorism Coordinator; Preventing lone actor terrorism - Food for thought, Brussels, 23 April 2012, 9090/12, 1.
[69] Weimann, G., op. cit. p.1.
[70] EU Counter-Terrorism Coordinator (CTC), Annual report on the implementation of the EU Counter-Terrorism Strategy, Brussels, 23 November 2012, 16471/12, 32.
[71] Weimann,1, referring to speech reported, *inter alia*, at http://www.telegraph.co.uk/news/worldnews/barackobama/8705719/Barack-Obama-fears-a-lone-wolf-extremist-attack-more-than-al-Qaeda-spectacular.html.
[72] Weimann, 2.
[73] Weimann, 7.
[74] Weimann, 7.
[75] Annex to Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6(6) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Financing Tracking Programme … to the Communication from the Commission to the European Parliament and the Council on the Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6(6) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Financing Tracking Program. Brussels 27.11.2013, COM (2013) 843 final, page 13.
[76] EU Counter-Terrorism Coordinator, 9090/12, 6.
[77] Ibid. 7.

enforcement "outreach" to radical and other potential terrorist communities, whatever their motivation, "is key to providing early warnings of threats", citing the Cyber Intelligence Unit of New York Police Department. The Counter-Terrorism coordinator has highlighted the role of "community policing and the role of local police" in this context.[78] This issue should form part of the review of the EU's counter-terrorism strategy.

In this context it is arguable that the borderline between organised crime and terrorism "is increasingly blurred", particularly in the cyber-context.[79] The techniques developed for addressing cyber facilitated crime could also be used to address cyber facilitated terrorism. It is arguable that the new Europol Cybercrime Centre (EC3), in conjunction with the "Check the Web" programme,[80] could at least provide a co-ordination role on this topic, building on the anti-radicalisation RAN network's work on line.[81] The EC3 centre was set up in January 2013, and has been tasked with being the "European information hub on cybercrime, developing cutting edge digital forensic capabilities to support investigations in the EU and building capacity to combat cybercrime through training, awareness raising and delivering best practice on cybercrime."[82] Their current crime areas reflect the priorities of the CoE Convention on Cybercrime, also known as the Budapest Convention.[83] These are attacks against computer systems, online child pornography, cyber facilitated forgery, fraud and breach of copyright and related rights. There are noticeable absences from this Convention in the context of counter-terrorism, which the EU, for the benefit at least of its own member states, should be in a position to address.

Massive data processing for law enforcement purposes

Technology is developing quickly, providing new capabilities which appear at first glance, to be attractive to the counter-terrorism and law enforcement community. However unchecked use of these capabilities could lead to a situation akin to a police state. In particular, in the EU, the CFR provisions on the right for private and family live (Article 7) and the right to the protection of personal data (Article 8) need to be fully respected. Data protection rights as understood in EU/ CoE countries, in particular, are often not reflected in the legal systems of other jurisdictions, in particular the United States of America, as elaborated on by Papakonstantinou and De Hert.[84] However, the fact that the US-NSA has been able to operate the contested PRISM operation is no indication of its legality under US law. One US based academic author[85] has already pointed out that scenarios such as the recent US-NSA mass surveillance activities, while they may be permitted by the US Patriot

[78] Ibid. 6.
[79] EU Counter-Terrorism Coordinator (CTC), 2012, 16471/12, 10.
[80] EU Action Plan on combating terrorism, EU Counter-Terrorism Coordinator (CTC), Brussels, 17 January 2011, 15893/1/10, 5.
[81] EU Strategy for combating Radicalisation and Recruitment to Terrorism & the Radicalisation Awareness Network (RAN). (http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/index_en.htm)
[82] Europol news release: European Cybercrime centre to be established at Europol, 28 March 2012, available at http://www.europol.eu, accessed on the 25/11/13.
[83] CoE ETS 185, Convention on Cybercrime, Budapest, 23.XI.2001.
[84] V. Papakonstantinou and P. De Hert, "The PNR Agreement and transatlantic anti-terrorism co-operation: no firm Human Rights Framework on either side of the Atlantic", (2009) 46(3) CML Rev. 885-919.
[85] Smith J.C.; The USA Patriot Act: Violating reasonable expectations of privacy protected by the fourth amendment without advancing national security, (2003) 82 N.C. L. Rev. 412 (North Carolina Law Review).

Act,[86] would appear to breach the fourth amendment to the US Constitution, which protects against unreasonable searches and seizures.[87] He does point out that US Constitutional protections have regularly been suspended at times of crises. This this suspension of protection will not be happening before either the CoJ (*Kadi*) or before the ECtHR (*Brannigan*), where both courts have pointed out the need to ensure human and fundamental rights at the times of crises. The issue of the legality of the PRISM programme still has to be fully tested before the US Supreme Court. However, US law regularly extends protection to its own citizens, and those resident in the US, but not to those resident in other parts of the world.

The EU, in contrast, does not make the same clear distinction between citizens and non-citizens, with Guild stating that "Legal norms at the European Union and the Council of Europe levels enhance the claims of those present on the territory to participate in political life irrespective of whether they have been admitted to the nation as citizens in law."[88] In addition the EU conception of rights can be conferred on third country nationals in the external treaty relations of the EU, as seen in *Pokrzeptowicz-Meyer*[89] and *Simutenkov*,[90] when the "provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[91] Worth noting, in particular, is the tone of the discussion in the key EU counter-terrorism case to date, *Kadi*.[92] The judgment in *Kadi* started off with a statement to the effect that Mr. Kadi was a resident of Jedda, Saudi Arabia. The judgment then went on to discuss fundamental and procedural rights,[93] to include a statement at paragraph 285 of the ruling that there was a principle in EC law that "all Community acts must respect fundamental rights". At no point in the ruling was there any further reference to the fact that Mr. Kadi was based in Saudi Arabia and was or was not an EU citizen. Neither the parties arguing the case, not the court, ever appear to have considered that Mr. Kadi's nationality or formal permanent residence was at issue. The EU and US approach must therefore substantially diverge in this area (until at least the US reform their legal provisions in this area, an issue which is being currently examined in light of the Wikkileaks revelations).

The approach favoured by the EU for transnational law enforcement and the "prevent" and "pursue" aspect of the EU counter-terrorism policy and practice is "intelligence led policing", as originally developed by the UK.[94] Activities in this area need to maintain full respect at all times for data protection laws. This should have the beneficial nock on effect of

---

[86] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[87] IV Amendment to the US Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[88] Elspeth Guild; Citizens, Immigrants, Terrorists and Others, Chapter 9 in Steve Peers and Angela Ward eds.; The EU Charter of Fundamental rights; politics, law and policy, essays in European Law. Hart Publishing Oxford, 2004, at page 242.

[89] Case C-162/00; *Land Nordrhein-Westfalen* v *Beata Pokrzeptowicz-Meyer*, [2002] ECR page I-01049.

[90] Case C-265/03; *Igor Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR page I-02579.

[91] Case C-162/00; *Land Nordrhein-Westfalen* v *Beata Pokrzeptowicz-Meyer*, [2002] ECR page I-01049, at paragraph 19 of the judgment.

[92] Joined Case C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakatt International Foundation* v. *Council and the Commission*, [2008] ECR p.I-06351.

[93] E.g. at paragraph 270.

[94] Jerry Ratcliffe; Intelligence-Led Policing, Willan, 2008.

greater data security, substantially reducing the chances for individual operatives to down load vast amounts of intelligence data, and either selling it to the highest bidder, or releasing it to the public. Specialist units operate within each of the EU member states are familiar with this style of policing. As Mitsilegas has called for, the current review of the EU's counter-terrorism strategy is an opportunity to develop a "coherent framework for the protection of personal data and privacy".[95] Current activities and future developments of EU agencies will need to Article 8 CFR (protection of personal data) and Article 8 ECHR (right to respect for private and family life) complaint,[96] with exclusively national measures also needing to ensure that they comply with Article 8 ECHR.

Data protection laws are very much a child of our times, with recent developments of "automated massive processing of personal data".[97] These are currently "a key concern for civil liberties and human rights advocates".[98] Major cases on this topic have recently been ruled on by the EU's CoJ in *Digital Rights Ireland*,[99] and have been filed before the ECtHR.[100] Questions as to the admissibility and non-exhaustion of domestic remedies still have to be addressed in the ECtHR case. However this particular ECtHR case develops, the issues raised, being mass surveillance, the use of warrants, and effective judicial oversight, will have to be resolved from a human rights perspective, before some court, in one or other of the relevant jurisdictions, in the near future. A start has been made in addressing these issues, before the CoJ, in *Digital Rights Ireland*.

The new legal status of the CFR was centre stage in the recent case of *Digital Rights Ireland*,[101] a case directly related to cross border law enforcement and counter-terrorism activities. A number of CFR rights came into play in this case, namely Article 7 right for private and family life, and Article 8 protection of personal data. Article 52.1 provides that any derogations from these rights "must be provided for by law", the need to be proportionate, and be "necessary and genuinely meet objectives of general interest" or "the needs to protect the rights and freedoms of others", such as meeting the Article 6 CFR right to liberty and security.

Directive 2006/24, the "data retention directive",[102] was the legislation in question. The use of data in the context of counter-terrorism is key to activities in this area. As the Counter-Terrorism Coordinator has pointed out, "data sharing and information management remain a core challenge in the fight against terrorism."[103] Based on the CoE's Convention for the

---

[95] V. Mitsilegas; The third wave of third pillar law. Which direction for EU criminal justice, E.L.Rev. 2009, 34(4), 523-560, 557/558.
[96] Joined Cases C-465/00, C-138/01 and C-139/01; *Neukomm* and *Rundfunk* [2003] ECR page I-04989.
[97] de Hert, Papakonstantinou, The data protection framework decision of 27 November 2008 regarding police and judicial cooperation in criminal matters – A modest achievement however not the improvement some have hoped for, 25 (2009) *Computer Law & Security Review* 403-414, 403.
[98] Quirine Eijkman, Bart Schuurman, Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation, June 2011, International Centre for Counter-Terrorism, the Hague, 99.
[99] Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd*.
[100] Application no. 58170/13; *Big Brother Watch, Open Rights Group, English Pen, Dr. Constanze Kurz*, v *United Kingdom*, Joint application under Article 34 (re GCHQ).
[101] Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd*.
[102] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13/04/2006 p. 54.
[103] EU Counter-Terrorism Coordinator (CTC), 16471/12, 26.

Protection of Individuals with regard to Automatic Processing of Personal Data,[104] the EU's approach in this area[105] has been developed by the German Federal Constitutional Court.[106] Society, EU and CoE law all require that its personal data be protected. However society and the law also require the police and security agencies to provide security. In addition, it must be borne in mind that commercial data is something quite different from "police information".[107] De Hert and Papakonstantinou have pointed out that police, and also presumably counter-terrorism data, can often, until an investigation develops, be "based on uncertain facts or on assumptions and hearsay" which does not match the nature of hard data used in a commercial context.[108] This difference in the nature of law enforcement/ counter-terrorism data needs to be reflected in its oversight arrangements.

The data retention directive placed an obligation on communication service providers to retain data on users of "publicly available electronic communication services",[109] with the data to be retained being what some are referring to as "meta-data", rather than the content of the actual communication.[110] The data so retained was to be provided only to "competent national authorities in specific cases and in accordance with national law".[111] The period of the data retention was to be between six months to two years,[112] with no further detail as to different categories of data, offender, or suspected offender, or rules as to the storage of the data.

The CoJ found that the EU, in adopting Directive 2006/24 "had exceeded" its limits, and breached the "principle of proportionality …in the light of Articles 7, 8 and 52(1) of the" CFR.[113] The court did not examine the facts of the case with regard to Article 11 of the Charter, which covers the right to freedom of expression and information,[114] a matter which might still arise in a subsequent case. The court was clear in its judgment that the EU, when passing laws in these areas, "must lay down clear and precise rules" covering "the scope and application" of the piece of legislation, "imposing minimum safeguards" to protect personal data against "abuse", or "any unlawful access and use of that data".[115] The possibility of automatic processing is envisaged, however the "need for such safeguards is all the greater" in this case.[116]

The provisions of Directive 2006/24 were not targeted,[117] therefore not using intelligence led policing, and led to data being retained for persons for whom there wasn't even a remotest connection to serious crime, with the court pointing out that professional/

---

[104] 1981, in force 1985, CET 108.
[105] Kuner, An international legal framework for data protection: Issues and prospects, 25 (2009) *Computer Law & Security Review* 307-317, 308.
[106] Bundesverdassunsgericht, Judgment of 15 December 1983, 65 BVerfGE 1.
[107] de Hert, Papakonstantinou; op. cit. p. 408.
[108] Ibid.
[109] Article 3.1 of Directive 2006/24/EC.
[110] Joined Cases C-293/12 and C-594/12, Opinion of Advocate General Cruz Villalón delivered on 12 December 2013 (1). *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resources*, [2013] ECR page 00000, paragraph 56 of the Opinion.
[111] Article 4 of Directive 2006/24/EC.
[112] Article 6 of Directive 2006/24/EC.
[113] Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd*. at paragraph 69 of the judgment.
[114] Paragraph 70 of the ruling.
[115] Para 54 of the judgment.
[116] Para 55 of the judgment.
[117] Paragraph 59 of the judgment.

commercial secrecy was being breached by the operation of the directive.[118] Presumably also the requirements of the communication of classified information through "publicly available electronic communication services" was also being breached. The breaching of Articles 7 and 8 CFR rights was, according to the court, lacking "objective criteria in order to ensure that it is limited to what is strictly necessary."[119] In addition the lack of both "clear and precise rules governing the extent of [that] interference", and when the 6 months or a greater period, up to the 24 months was to be used by individual member states[120] was also at issue.

Case law of the ECJ has already established that data protection rights can be compromised, with the *Promusicae* case requiring the balancing of commercial data protection rights with the right "to the protection of property".[121] In the *Neukomm* and *Rundfunk* judgment,[122] the pre-Lisbon ECJ was prepared to compromise the right to data protection for the sake of the "proper management of public funds",[123] where the names of recipients of personal remuneration over a particular high threshold paid from the public purse were to be widely disclosed, as well as the amount of their remuneration. It is to be anticipated that the right to data protection and privacy will be all the more likely to be compromised by the needs of legitimate law enforcement and counter-terrorism activities. The right to data protection is not an "absolute prerogative and can be subject to restrictions in the general interest".[124] It is only the "right to life and the right to be free from torture or inhuman or degrading treatment or punishment" which can be seen to be absolute and non-derogable.[125]

In addition the standards provided for in Directive 2006/24 the actual storage of the data were inadequate in *Digital Rights Ireland*. The court pointed out that the regime under the data retention directive "does not ensure … a particularly high level of protection and security"[126] for what is anticipated to be a "vast quantity of data".[127] In addition there was no recognition of the "sensitive nature of that data", or were there any measures covering "the risks of unlawful access to that data".[128] There was also no obligation on the member states to implement rules on these issues.[129] Furthermore, the service provider could take in account "economic considerations when determining the level or security", and did not "ensure the irreversible destruction of the data at the end of the data retention period", whenever that was to be, between the six months and two years stated in the directive.[130] There was also no requirement to keep this data within the EU,[131] and therefore in jurisdictions subject to EU law.

---

[118] Paragraph 58 of the judgment.
[119] Para 64 of the judgment.
[120] para 65 of the judgment.
[121] Case C-275/06 *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU* [2008] ECR I-271.
[122] Joined Cases C-465/00, C-138/01 and C-139/01; *Neukomm* and *Rundfunk* [2003] ECR I-04989.
[123] At paragraphs 50 and 94 of the Judgment, and paragraph 1 of the ruling.
[124] S. Peers: Taking Rights Away? Limitations and Derogations, p. 141, Chapter 6 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, 143.
[125] Ibid. referring to Case C-112/00, *Schmidberger* [2003] ECR I-05659.
[126] Paragraph 67 of the judgment.
[127] Paragraph 66 of the judgement.
[128] Paragraph 66 of the judgement.
[129] Paragraph 66 of the judgement.
[130] Paragraph 67 of the judgment.
[131] Paragraph 68 of the judgment.

Clearly the standard of forward planning and risk assessment in dealing with personal data under EU law, even for law enforcement and counter-terrorism purposes, was insufficient to meet the standards required by the CFR. While automated processing of data is anticipated for these purposes, the data collection needs to be targeted, based on intelligence led policing and not part of a massive data surveillance programme, and the storage standards set out in the legislation, and applied in practice, need to be vastly improved. Going forward it will be expected that data retained further to EU law will have to be kept within the EU in order to ensure that it continues to be subject to EU law, and the continuing "protection of individuals with regard to the processing of personal data,"[132] to include the recently accepted "right to be forgotten", [133] the extent to which it will apply to Article 13 exemptions[134] processing still having to be established. The processing of that data also needs to be subject to control by "an independent authority", in order to ensure both "protection and security", as required by Article 8(3) CFR.[135]

At the time of writing, recognising that the laws are currently subject to proposals for reform,[136] at Europol it is currently possible to verify "the legality of retrievals for any of its automated data files",[137] with all such requests being logged, and capable of being audited[138] by both Europol's National Supervisory Bodies,[139] and the Joint Supervisory Body.[140] This process addresses both the data protection and data security concerns, which at one level of the discourse can be seen as both sides of the same coin. Such a robust audit trail for data processing by law enforcement and counter-terrorism operatives, on the basis of intelligence led policing, would address some of the data protection and data security fears that have been discussed recently in the press. Also worth noting is that Europol has its own data protection officer[141] and support staff. If Europol can have such an officer, then all law enforcement and counter-terrorism agencies, and their counterparts within each EU member state, should be able to operate a similar process, with appropriately security cleared personnel. There also needs to be a formal reporting mechanism for potential whistle-blowers, with this author suggesting that at the EU level would benefit from the involvement of both the EU Agency for Fundamental Rights and the European Data Protection Officer in that whistle-blowing mechanism, in order to maintain both data protection and data security rules. Similar mechanisms should be put in place within the relevant agencies and organisations of the EU member states, as law enforcement or counter-terrorism operatives operating in a high security environment do not have the option of directly going to the press.

---

[132] Paragraph 68 of the judgment.
[133] Case C-131/12, *Google Spain SL* v *AEPD*, [2014] ECR, page 0000.
[134] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995 p. 31, Article 13 dealing with national security, law enforcement, etc. exemptions.
[135] Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd*. at paragraph 68 of the ruling.
[136] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173.
[137] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15/05/2009, 37, Article 18.
[138] Ibid.
[139] Ibid. at Article 33.
[140] Ibid. at Article 34.
[141] Ibid. Article 28.

Conclusion

The new Treaty on European Union also provides, at Article 19 EU that there is a right to "effective legal protection". The Court of Justice has declared "that the right to judicial protection is one of the general principles of law stemming from the constitutional traditions of Member States".[142] With the expiration of the five year phase in period of the Lisbon Treaty, [143] the EU's PJCCM counter-terrorism provisions become fully subject to oversight by the Court of Justice, having become supranational law, rather that the intergovernmental law of the pre-Lisbon era. This development will have a dramatic impact on the design and operation of the EU's counter-terrorism legal and policy framework going forward.

The issue of potential gaps in judicial oversight of cross border law enforcement and by extension, counter-terrorism provisions has already been addressed by Hinarejos, stating that any gaps would "be considered unsatisfactory", pointing out that there is a need for the CoJ and the national courts to "strive to cooperate"[144] in practice, in order to ensure that there is, in fact, no gap in the judicial oversight of cross–border law enforcement and prosecution activity.

While there is still room for Onuf style constructivism in the AFSJ, this should be reserved to new areas of law enforcement, where the development of a mutual understanding at the practitioner level is still required. Constitutionalism should now be the dominant them, with both current and new provisions increasingly being brought within the legal framework of the CFR, and the EU's other "constitutional documents" and traditions, by legislators, and should there be a failure to do so, by the CoJ. Peters is clearly of the view that the "EU is a constitutional and constitutionalist system on the ground that individuals enjoy constitutional protection against the organisation itself, and are empowered to enforce that protection."[145] This will increasingly be seen in the CoJ judgments, in particular post the 5 year phase in period of the Lisbon Treaty. As Nuotio has stated, there needs now to be a "'taming' of politics", with the stakes in the construction of a transnational criminal framework being "very high".[146] There is an "ongoing transformation of criminal law" this transformation needs to take a constitutionalisaiton approach, with the "full impact" of these post-Lisbon changes not yet being obvious.[147]

---

[142] Ester Herlin-Karnell, op. cit. p.47, referring to a series of cases.
[143] Pursuant to Protocol (No 36) on Transitional Provisions attached to the post Lisbon TEU and TFEU.
[144] Hinarejos, A.; Law and order and internal security provisions in the Area of Freedom, Security and Justice: before and after Lisbon, chapter 9 of Christina Eckes and Theodore Konstadinides (eds). Crime within the Area of Freedom, Security and Justice, A European Public Order, Cambridge University Press, 2011, 270.
[145] Ann Peters Chapter 10 The Constitutionalisation of International Organisations, in Neil Walker and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011, page 268.
[146] Kimmo Nuotio, op. cit. page 332.
[147] Ibid. page 312.

Bibliography:

Primary Legislation

CoE ETS 185, Convention on Cybercrime, Budapest, 23.XI.2001.
(Post-Lisbon) Treaty on European Union
Treaty on the Functioning of the European Union

Secondary Legislation

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.
Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26/10/2010, 1.
Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121, 15/05/2009, 37.
Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27/03/2009, 24.
Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13/04/2006, 54.
Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31/01/2003, 41.
Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995, 31.

Legislative Proposals

Commission working document on the feasibility of an index of third-country nationals convicted in the European Union, COM (2006) 359 final.
Green paper form the Commission, Procedural Safeguard for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75.
Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.
Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326.

Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings, COM (2005) 696 final.
Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173.

Policy Documents

Annex to Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6(6) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Financing Tracking Programme … to the Communication from the Commission to the European Parliament and the Council on the Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6(6) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Financing Tracking Program. Brussels 27.11.2013, COM (2013) 843 final 13.
EU Action Plan on combating terrorism, EU Counter-Terrorism Coordinator (CTC), Brussels, 17 January 2011, 15893/1/10, 5.
EU Counter-Terrorism Strategy, Brussels, 30th November 2005. SEC 14469/4/05 REV 4.
Stockholm Action Plan, COM (2010) 171 of 20.04.2010.
EU Counter-Terrorism Coordinator; Preventing lone actor terrorism - Food for thought, Brussels, 23 April 2012, 9090/12.
EU Counter-Terrorism Coordinator (CTC), Annual report on the implementation of the EU Counter-Terrorism Strategy, Brussels, 23 November 2012, 16471/12.
EU Strategy for combating Radicalisation and Recruitment to Terrorism & the Radicalisation Awareness Network (RAN). (http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/index_en.htm).
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Books:

Cardwell, P.J.; EU External Relations and System of governance The CFSP, Euro-Mediterranean Partnership and Migration, Routledge 2009.
Doolan, B., Constitutional Law and its Constitutional Rights in Ireland, 3rd edition, Gill & Macmilan Ltd. 1994.
Eckes C. and Theodore Konstadinides (eds.); Crime within the Area of Freedom, Security and Justice A European Public Order, Cambridge University Press, 2011.
Howard Gibbs, A.H. "Constitutional Life and Europe's Area of Freedom, Security and Justice, Asghate, Surrey, 2011.
Herlin-Karnell, E.; The Constitutional dimension of European Criminal Law, Hart Publishing Ltd. 2012.
Morgan, D.G., Constitutional law of Ireland, The Round Hall Press, 1985.

Peers S. and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004.
Ratcliffe, J.; Intelligence-Led Policing, Willan, 2008, 63.
Walker N. and Stephan Tierney eds. A constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism, Hart Publishing, 2011.

Book Chapters:

Kubáklová, V.; Twenty Year's Catharsis, in Vendulka Kubáklová, Nicholas Onuf, Paul Kowert, eds. International relations in a Constructed World. M.E. Sharpe, New York, 1998.

Journal Articles:

Cartabia M.: Europe and Rights: Taking Dialogue Seriously, European Constitutional Law Review, 5: 5-31, 2009, 8.
de Hert, Papakonstantinou; The data protection framework decision of 27 November 2008 regarding police and judicial cooperation in criminal matters – A modest achievement however not the improvement some have hoped for, 25 (2009) *Computer Law & Security Review* 403-414.
Kuner, An international legal framework for data protection: Issues and prospects, 25 (2009) *Computer Law & Security Review* 307-317.
Lenaerts, K., The contribution of the European Court of Justice to the area of freedom, security and justice, International & Comparative Law Quarterly, 2010, I.C.L.Q. 2010, 59(2), 255-301.
Mitsilegas V. ; The third wave of third pillar law. Which direction for EU criminal justice, E.L.Rev. 2009, 34(4), 523-560.
Papakonstantinou V. and P. De Hert, "The PNR Agreement and transatlantic anti-terrorism co-operation: no firm Human Rights Framework on either side of the Atlantic", (2009) 46(3) CML Rev. 885-919.
Shaw, J.; Postnational constitutionalism in the European Union, Journal of European Public Policy 6:4 Special Issue 1999: 579-97.
Smith J.C.; The USA Patriot Act: Violating reasonable expectations of privacy protected by the fourth amendment without advancing national security, (2003) 82 N.C. L. Rev. 412 (North Carolina Law Review).
van Puyenbroeck L. and Gert Vermeulen; Towards minimum procedural guarantees for the defence in criminal proceedings in the EU, International and Comparative Law Quarterly, Volume 60, Issue 04, October 2011, pp. 1017-1038, 22.
Weimann, G.; Lone Wolves in Cyberspace, Journal of Terrorism Research, Vol. 3, Issue 2 (2012), available at http://ojs.st-andrews.ac.uk/index.php/jtr/article/view/405/431, 1.

Papers

Dine, J.; Criminal Law and the Privilege Against Self-Incrimination, p. 269, Chapter 11 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, 270.
Eijkman, Q. and Bart Schuurman, Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation, June 2011, International Centre for Counter-Terrorism, the Hague.

Case law:

ECJ/CoJ cases

Case C-131/12, *Google Spain SL* v *AEPD*, [2014] ECR, page 0000.
Joined Cases C-293/12 and C-594/12; Case C-293/12; *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*, and *Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, OJ C 175, 10/06/2014 p. 6.
Case C-275/06 *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU* [2008] ECR I-271.
Case C-265/03; *Igor Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR page I-02579.
Case C-105/03, *Reference for a preliminary ruling from the Tribunale di Firenze (Italy), in criminal proceedings against Maria Pupino*, OJ C 193, 06/08/2005, 3.
Joined Cases C-402/05 P and C-415/05 P: *Yassin Abdullah Kadi, Al Barakatt International Foundation* v. *Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351.
Joined Cases C-465/00, C-138/01 and C-139/01; *Neukomm* and *Rundfunk* [2003] ECR page I-04989.
Case C-162/00; *Land Nordrhein-Westfalen* v *Beata Pokrzeptowicz-Meyer*, [2002] ECR page I-01049.
Opinion 1/91, Draft Agreement relating to the creation of the European Economic Area, [1991] ECR I-6079.
Case 265/87; *Schräder* v. *Hauptzollamt Gronau* [1989] ECR 2237.
Case 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] 1651.
Case 294/83 *Parti Ecologiste "Les Verts"* v. *European Parliament* [1986] ECR 1339.
Case 98/79 *Pecastaing* v *Belgium* [1980] ECR 691

ECtHR cases

Application no. 58170/13; *Big Brother Watch, Open Rights Group, English Pen, Dr. Constanze Kurz,* v *United Kingdom,* Joint application under Article 34 (re GCHQ).
Application no. 5/1992 *Brannigan and McBride* v. *the United Kingdom, ,* 26-5-1993, paragraph 43.

Other documents

European Parliament Fact Sheets, 2.1.1. Respect for fundamental rights in the EU – general development, available at http://www.europarl.europa.eu/factsheets/2_1_1_en.htm.
Europol news release: European Cybercrime centre to be established at Europol, 28 March 2012, available at http://www.europol.eu, accessed on the 25/11/13.